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No. 4202 1385

1391 1385

United States Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

HERBERT H. McGOVERN, Jr.,
Defendant in Error.

PETITION FOR RE-HEARING BY PLAINTIFF IN ERROR.

JOHN L. SLATTERY,
United States Attorney.
RONALD HIGGINS,
Assistant United States Attorney.
Attorneys for Plaintiff in Error.

NAEGELE PRINTING CO., HELENA, MONT

No. 4202.

United States Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

HERBERT H. McGOVERN, Jr.,
Defendant in Error.

PETITION FOR RE-HEARING BY PLAINTIFF IN ERROR.

JOHN L. SLATTERY,
United States Attorney.

RONALD HIGGINS,
Assistant United States Attorney.

Attorneys for Plaintiff in Error.

PETITION FOR RE-HEARING

Now comes the United States of America, Plaintiff in Error, in the above entitled cause, and moves the Court to grant a re-hearing in this Cause for the following reasons:

I.

That this cause was tried and is triable only under the Tucker Act (Act March 3, 1887, 24 Stat. 506; also Section 24, Par. 20, Judicial Code), and appellate jurisdiction of the same as provided by said act lies in the Supreme Court of the United States and not in the Circuit Court of Appeals for the Ninth Circuit.

> See Section 13, War Risk Insurance Act 40 Stat. 555; also Section 19 of the Act of June 7, 1924, known as the World War Veterans' Act, 1924, Public—242, 68th Congress, enacted two days prior to June 9, 1924, the date upon which this case was decided by this Honorable Court, and designated further as "An Act To consolidate, codify, revise, and reenact the laws affecting the establishment of the United States Verterans' Bureau and the administration of the War Risk Insurance Act, as amended, and the Vocational Rehabilitation Act, as amended."

Parenthetically, attention is directed that in all of the cases involving CLAIMS for War Risk Insurance which were tried by the various courts prior to the decision of the Honorable Court in the present case, it was held that such cases were properly brought under the procedure provided for by the Tucker Act, which expressly provides that such cases shall be tried by the Court without a jury.

II.

That under the Tucker Act, causes are tried without a jury, and hence there was no necessity of a waiver in writing of a jury before trying this action.

III.

That the trial court took jurisdiction of this Cause as one coming under the Tucker Act, and tried it according to the provisions of said Act, and both parties acquiesced in and believed that such jurisdiction and such trial theory were correct, and having proceeded on such basis, this action does not come within the provisions of Section 640 R. S., and the parties accordingly were not required specifically to waive a jury in writing, and having elected and accepted without objection such jurisdiction and trial theory are now foreclosed from asserting any other.

Campbell vs. Boyreau, 62 U. S. 223-228, 16 L. Ed. 96-97.

One theory cannot be accepted and prevail without objection at the trial, and another upon appeal, particularly when such condition jeopardizes and denies the rights of one of the parties. Furthermore, good faith requires that Defendant in Error continue throughout the suit as he began.

IV.

That error of law appears on the face of the record in that the complaint alleges Defendant in Error was suffering from a disability which it is reasonably certain will continue throughout the remainder of his lifetime, while judgment was given for a disability, not which was reasonably certain would continue throughout the remainder of the insured's lifetime, but which would probably exist for a long indefinite time. Thus a variance appeared in the "process, pleadings and judgment" which this Honorable Court should take cognizance of regardless of the absence of a written waiver of a jury.

V.

That the refuge which Defendant in Error sought within the provisions of Section 649 R. S. was asserted for the first time by Defendant in Error in his brief before this Honorable Court, and such tactics took Plaintiff in Error by surprise and did not allow Plaintiff in Error sufficient time to prepare for a thorough discussion and presentation of the case from such angle, and Plaintiff in Error contends for the privilege on rehearing of meeting this issue squarely.

VI.

That the case of U. S. vs. Pfitsch, 256 U. S. 547,

is not decisive of the jurisdictional question herein because there is a difference and a distinction between cases arising under Section 10 of the Lever Act and Section 13 of the War Risk Insurance Act. Under the former, the government becomes the instigator and moving party by seizing goods for war purposes, while in the latter, the insured is the moving party. The courts have consistently drawn a distinction between cases in which the United States is being sued and cases in which the United States enters the courts as a litigant. As applying to cases under the War Risk Insurance Act, the Pfitsch case is no more than dictum.

Schillinger vs. U. S. 155 U. S. 163, 15 Sup. Ct. 85, 39 L. Ed. 108.

Shooters Island Ship Yard Co. vs. Standard Ship Building Co., 293 Fed. 707.

VII.

That the statute requiring written waiver of a jury has been superceded and supplanted by Section 269 Judicial Code as amended by Act of February 26, 1919, Chapter 48; Section 1246, 1919 Supplement C. S., which latter act was passed to dispense with technicalities and to allow litigation to be disposed of upon the merits. It provides in substance that on the hearing of a Writ of Error in any civil case, the court shall give judgment

after an examination of the entire record before the court without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties. Failure to waive jury trial by stipulation and file same as part of the record can be classified as nothing other than a technicality.

VIII.

That if the above action is triable under the usual and ordinary jurisdiction of the District Court, and should have been tried by jury instead of to the court, as provided by the Tucker Act, then there should be reversal and a new trial ordered, because the proceeding heretofore had was not a trial, but only a usurpation by the trial court of jurisdiction not conferred.

WHEREFORE, the Plaintiff in Error prays that a re-hearing be granted and that this Honorable Court stay its judgment and reverse the same or certify the case to the Supreme Court of the United States under the provisions of the Act of September 14, 1922 (Judicial Code 238a, 42 Stat. 837).

JOHN L. SLATTERY,
United States Attorney.

RONALD HIGGINS,
Assistant United States Attorney.

Attorneys for Plaintiff in Error.

CERTIFICATE OF COUNSEL.

This is to certify that in our judgment the foregoing Petition for Re-hearing in the above cause is well founded, and is made and filed in good faith and is not interposed for delay.

JOHN L. SLATTERY,
United States Attorney.

RONALD HIGGINS,
Assistant United States Attorney.

Attorneys for Plaintiff in Error.

No. 4203

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNION ASSURANCE SOCIETY, LTD., a Corporation,

Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Oregon.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4203

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNION ASSURANCE SOCIETY, LTD., a Corporation,

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Names and Addresses of Attorneys of Record.

VEAZIE and VEAZIE, Corbett Building, Portland, Oregon,
For the Plaintiff in Error.

ARTHUR C. SPENCER and ARTHUR A. MURPHY, Pittock Block, Portland, Oregon,
For the Defendant in Error.

Citation on Writ of Error.

United States of America,
District of Oregon,—ss.

To Oregon-Washington Railroad & Navigation Company, a Corporation, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein Union Assurance Society, Ltd., a Corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, the 13th day of December, in the year of our Lord one thousand nine hundred and twenty-three.

A. S. BEAN,
Judge. [1*]

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*Page-number appearing at foot of page of original certified Transcript of Record.

[Endorsed]: No. L.–8953. 30–147. United States District Court, District of Oregon. Union Assurance Society, Ltd., a Corporation, vs. Oregon Washington Railroad & Navigation Company, a Corporation, Citation on Writ of Error. U. S. District Court, District of Oregon. Filed Dec. 13, 1923. G. H. Marsh, Clerk.

Due service of the within citation is hereby acknowledged at Portland, Oregon, this 13th day of December, 1923.

A. C. SPENCER,
ARTHUR A. MURPHY,
Of Attorneys for Defendant and Defendant in Error.

In the United States Circuit Court of Appeals for the Ninth Circuit.

UNION ASSURANCE COMPANY, LTD., a Corporation,

Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant in Error.

Writ of Error.

The United States of America,—ss.

The President of the United States of America, to the Judge of the District Court of the United States for the District of Oregon, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between Union Assurance Company, Ltd., a corporation, plaintiff and plaintiff in error, and Oregon-Washington Railroad & Navigation Company, a corporation, defendant and defendant in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 13th day of December, 1923.

[Seal] G. H. MARSH,
Clerk of the District Court of the United States for the District of Oregon.

By F. L. Buck,
Chief Deputy. [2]

[Endorsed]: No. ——. In the U. S. Circuit Court of Appeals for the Ninth Circuit. Union Assurance Society, Ltd., Plaintiff in Error, vs. Oregon-Washington Railroad & Navigation Company, Defendant in Error. Writ of Error. Filed December 13th, 1923. G. H. Marsh, Clerk United States District Court, District of Oregon. By F. L. Buck, Chief Deputy Clerk.

In the District Court of the United States for the District of Oregon.

July Term, 1922.

BE IT REMEMBERED, That on the 21st day of July, 1922, there was duly filed in the District Court of the United States for the District of Oregon an amended complaint, in words and figures as follows, to wit: [3]

No. L.–9853.

UNION ASSURANCE SOCIETY, LTD., a Corporation,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Amended Complaint.

Comes now the plaintiff and pursuant to the orders of the Court files this its amended complaint, and for cause of action against said defendant complains and alleges:

I.

That plaintiff is, and at all times herein mentioned has been, a corporation organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with its principal place of business at London, England; and plaintiff is, and at all times herein mentioned was, a citizen of the United Kingdom of Great Britain and Ireland within the meaning of the laws relating to the jurisdiction of the courts of the United States.

That the defendant is, and at all of said times was, a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business at Portland, Oregon, and is, and at all said times was,

a citizen of the State of Oregon within the meaning of the said laws of the United States.

That the amount in controversy in this action exceeds the sum or value of $3000.00 exclusive of interest and costs. [4]

II.

That on the first day of March, 1921, and thereafter, until and including the 11th day of September, 1921, the Spokane, Portland & Seattle Railway Company, a corporation, was the owner of five freight-cars of the type commonly known as box-cars, and designated respectively by the numbers 3164, 3287, 3187, 3041 and 3179. That on said first day of March, 1921, the plaintiff was, and at all times herein mentioned has been, engaged in the business of insuring against loss or damage to property by fire; and on said first day of March, 1921, the plaintiff executed and issued to the said Spokane, Portland & Seattle Railway Company its policy of insurance numbered 65037, wherein and whereby the plaintiff insured the said Spokane, Portland & Seattle Railway Company for the term of one year, commencing on the first day of March, 1921, and ending on the first day of March, 1922, against loss or damage by fire to the said freight-cars, in the sum of $750.00 on each of the said freight-cars; and said policy of insurance remained and was in full force and effect on the 11th day of September, 1921.

III.

That on the 11th day of September, 1921, the freight-cars aforesaid were standing with other

cars on a side-track of the Spokane, Portland & Seattle Railway Company, adjacent to and within about fifteen feet from the main track of said Spokane, Portland & Seattle Railway Company, near McLaughlin, in the State of Washington; and on said day the defendant, by its servants, agents and employees, ran over said main track and past said freight cars a train composed of cars and an engine or engines belonging to and [5] operated by defendant. That said train was an east-bound freight train of defendant which passed said point at about noon of said day; that plaintiff does not know the number of said train, but defendant is fully informed as to the origin and circumstances of the fire hereinafter mentioned, and knows which of its trains caused the said fire. That defendant was so running its train over the tracks of the Spokane, Portland & Seattle Railway Company, under and by virtue of an agreement between the defendant and said Spokane, Portland & Seattle Railway Company, wherein the said Spokane, Portland & Seattle Company was designated as the Home Company and the defendant was designated as the Foreign Company, and wherein and whereby it was provided and mutually agreed, among other things, as follows:

> The Home Company shall not be held liable for or on account of any loss, damage, or delay, to the trains, engines, cars or other property of any kind of either company, nor to freight, baggage, or other property of any kind carried in or upon such trains, engines or cars, nor for or on account of any injury to or death of pas-

sengers or employees of either company, or other persons whomsoever, which may be incurred or sustained by reason of such trains being detoured, or by reason of such trains being delayed in such detouring, in whatever manner the same may be caused or occasioned, whether by or through the negligence of the Home Company, its agents or servants, or by reason of defects in the tracks, structures or facilities furnished by the Home Company, or otherwise, it being understood and agreed that all risk of such delay, loss, damage, injury and death shall be and is hereby assumed by the Foreign Company, and the Foreign Company shall and will hold harmless the Home Company from and against all liability or claims for all such delay, loss, damage, injury and death, and shall and will execute and deliver, or cause to be executed and delivered, to the Home Company, upon request, a full and complete release, satisfaction and discharge of all claims therefor, and will pay, or cause to be paid, all costs, and expenses incurred by either Company in the clearing of the wrecks and repairs of equipment, track and property in which by reason of detour movements covered by this agreement the engines, trains or cars of the Foreign Company are concerned, expenses and attorneys' fees incurred in defending any action, which may be brought against the Home Company on account of any such claim or liability and any judgment which may be rendered against the Home Company on account thereof. [6]

IV.

That at said time, and for about three months prior thereto, the weather was and had been hot and dry, and on said 11th day of September, 1921, the vegetation, structures and combustible objects along and adjacent to the track of the Spokane, Portland & Seattle Railway Company over which the defendant was so operating its train, were dry and inflammable; and said condition was well known to defendant.

V.

That nevertheless, defendant carelessly and negligently hauled said train with its engine or engines burning coal, which produced and threw out large quantities of burning particles upon the dry vegetation and other dry and inflammable objects adjacent to said track, and carelessly and negligently failed to equip its said engine or engines with safe, proper or adequate devices for preventing the escape of such burning particles, and carelessly and negligently failed to keep its said engine in such repair and condition as would prevent the throwing out of such burning particles, and carelessly and negligently hauled in said train a large number of cars constituting a load so great that said engine or engines labored heavily and thereby increased the number and size of the burning particles so thrown out, and carelessly and negligently ran the said train at a speed so great that the labor of the engine and the throwing out of burning particles was further increased. That while said train of defendant was so being run, and by reason of such negligence,

defendant negligently and carelessly caused its engine attached to said train to throw [7] out burning particles of coal or other substance upon the said freight-cars or the dry vegetation or other dry material adjacent to the said freight-cars, and thereby set the said freight-cars on fire.

VI.

That by the fire so caused and set, said freight-car number 3164 was damaged in the amount of $924.25, and said car numbered 3287 was damaged to the amount of $917.79, and said car numbered 3187 was damaged to the amount of $921.37, and said car numbered 3041 was damaged to the amount of $908.61, and said car numbered 3179 was damaged to the amount of $56.49; making the total of damage upon and to the said five cars $3,728.52. That under and by reason of its policy of insurance aforesaid, the plaintiff has paid to said Spokane, Portland & Seattle Railway Company $750.00 each on account of such loss and damage to the cars numbered 3164, 3287, 3187, and 3041, and the sum of $56.49 on account of such loss and damage to car numbered 3179; making the total paid by plaintiff to the Spokane, Portland & Seattle Railway Company on account of such loss and damage, $3,056.49. That such payment was made by plaintiff to the Spokane, Portland & Seattle Railway Company on or about the 18th day of November, 1921.

VII.

That in and by the policy of insurance aforesaid it was, [8] among other things, provided and agreed between plaintiff and the Spokane, Portland

& Seattle Railway Company, that if plaintiff should claim that any fire causing loss or damage insured against was caused by the act or neglect of any person or corporation, the plaintiff should, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting from such fire, and that such right of recovery should be assigned to plaintiff by the insured on receiving such payment. That upon payment by plaintiff to the Spokane, Portland & Seattle Railway Company of said sum of $3,056.49 as aforesaid, and in consideration thereof, Spokane, Portland & Seattle Railway Company did assign, set over, transfer and subrogate unto the plaintiff all of its rights, claims and causes of action against the defendant for or on account of the said fire and the loss and damage to the said freight-cars resulting therefrom, to the extent of said sum of $3,056.49, and plaintiff is still the owner and holder of the rights, claims and causes of action so assigned and transferred.

WHEREFORE, plaintiff prays judgment against defendant for the sum of $3,056.49, and for its costs and disbursements.

VEAZIE & VEAZIE,
Attorneys for Plaintiff.

State of Oregon,
County of Multnomah,—ss

I, R. E. Menefee, being first duly sworn, depose and say: That I am the attorney-in-fact within and for the State of Oregon of the above-named plaintiff, Union Assurance Society, Ltd., and [9]

make this verification on its behalf; that I know the contents of the foregoing amended complaint, and believe the same to be true.

R. E. MENEFEE.

Subscribed and sworn to before me this 20th day of July, 1922.

[Seal] J. C. VEAZIE,
Notary Public for Oregon.

My commission expires Feb. 8, 1925.

District of Oregon,
County of Multnomah,—ss.

Due service of the within amended complaint is hereby accepted in Multnomah County, Oregon, this 20th day of July, 1922, by receiving a copy thereof, duly certified to as such by J. C. Veazie, attorney for plaintiff.

A. A. MURPHY,
Attorney for Defendant.

Filed July 21, 1922. G. H. Marsh, Clerk. [10]

AND AFTERWARDS, to wit, on the 3d day of August, 1922, there was duly filed in said court an answer to amended complaint, in words and figures as follows, to wit: [11]

In the District Court of the United States for the District of Oregon.

No. L.–8953.

UNION ASSURANCE SOCIETY, LTD., a Corporation,

Plaintiff,

vs.

OREGON–WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Answer.

Comes now the defendant herein and for its answer to plaintiff's amended complaint herein, admits, denies and alleges, as follows:

I.

Denies that it has any knowledge or information sufficient to form a belief as to the truth or falsity of the matters set forth in paragraph I of plaintiff's said amended complaint, and defendant therefore denies the same and the whole thereof, except that defendant admits that the defendant is and at all of the times mentioned in plaintiff's amended complaint was a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of busi-

ness at Portland, and that it is and at all of said times was a citizen of the State of Oregon within the meaning of the laws of the United States relating to the jurisdiction of the courts of the United States.

II.

Denies that it has any knowledge or information sufficient to form a belief as to the truth or falsity of the matters set forth in paragraph II of plaintiff's said amended complaint, and defendant therefore denies the same and the whole thereof.

III.

Denies each and every allegation set forth in paragraph [12] III of plaintiff's amended complaint and the whole thereof, except that defendant admits that on the 11th day of September, 1921, the Spokane, Portland & Seattle Railway Company, a corporation, owned a railroad right of way at and near McLaughlin, in the State of Washington, together with a main track located on said right of way, and that said Spokane, Portland & Seattle Railway Company was at said time operating a railroad over said right of way and track, and that on said 11th day of September, 1921, a certain eastbound freight train belonging to defendant was run and operated over and along said right of way and track of said Spokane, Portland & Seattle Railway Company passing McLaughlin, Washington, at about noon of said day, with certain engines numbered 2113 and 2128, the property of the defendant, operated, directed and controlled by a pilot engineer furnished by said Spokane, Portland & Se-

attle Railway Company, subject to the rules and regulations of said company and to the orders of the train-dispatcher of said company. And said defendant further admits that said train was run and operated over said track of the Spokane, Portland & Seattle Railway Company under and by virtue of an agreement between the defendant and said Spokane, Portland & Seattle Railway Company wherein the said Spokane, Portland & Seattle Railway Company was designated as the Home Company and the defendant was designated as the Foreign Company, and wherein and whereby it was provided and mutually agreed, among other things, as is set forth by plaintiff on page 3, lines 5 to 20, inclusive, of its amended [13] complaint.

IV.

Admits the allegations of paragraph IV of plaintiff's said amended complaint, except that defendant denies that it had any knowledge of the condition on said 11th day of September, 1921, of the property of said Spokane, Portland & Seattle Railway Company, or of the vegetation, structures or objects thereon, save only as such property, vegetation, structures and objects may have been observed by its employees during the movement of the trains of defendant over the tracks of said Spokane, Portland & Seattle Railway Company, and defendant particularly denies any knowledge of any condition respecting any of such property which required the defendant to exercise greater care and precaution than was exercised by said defendant in

the movement of its trains over the tracks of the Spokane, Portland & Seattle Railway Company.

V.

Denies each and every allegation, averment and thing set forth and contained in paragraphs V, VI and VII of plaintiff's said amended complaint, and each and every part and the whole thereof.

And for a further and separate answer and defense to plaintiff's amended complaint, defendant alleges:

I.

That on the 11th day of September, 1921, the defendant owned a certain freight train known and designated as Extra East No. 2113, propelled by locomotives Nos. 2113 and 2128, which was run in an easterly direction over and along the tracks of the Spokane, [14] Portland & Seattle Railway Company passing McLaughlin in the State of Washington, at about noon of said day; that said freight train was the only freight train belonging to this defendant which was run in the vicinity of McLaughlin, Washington, in an easterly direction for a period of several hours prior to noon on said 11th day of September, 1921; that said freight train was operated by a pilot engineer of the Spokane, Portland & Seattle Railway Company with the assistance of engine crews and train crews of this defendant, and subject to the orders of the train-dispatcher of said Spokane, Portland & Seattle Railway Company, and to the rules and regulations of said company; that on said 11th day of September, 1921, and immediately prior thereto said locomotives numbered

2113 and 2128 were of first-class construction and repair and were equipped with suitable and proper spark-arresting devices, and said spark-arresting devices were at said time and place in proper position and in good condition and repair, and said locomotives were and each of them was furnished and supplied by this defendant with fuel of first-class quality and grade, and said locomotives were properly operated and maintained by competent employees, and were not overloaded, nor working up to their capacity, and everything was done in the construction, maintenance and operation of said locomotives to make them safe and secure against the escape of fire therefrom, and this defendant alleges that the fire complained of by plaintiff was not ignited or set by any of its officers, agents or employees, or by locomotive No. 2113 or locomotive No. 2128, or by any other locomotive of defendant operated over the line of railroad of the Spokane, Portland & Seattle Railway Company, or otherwise, and defendant [15] alleges that said alleged fire complained of by plaintiff was not caused by or through any act, fault, negligence or want of care on the part of this defendant or any of its agents, servants or employees. That the circumstances herein referred to are the same circumstances mentioned in plaintiff's amended complaint.

WHEREFORE, defendant having fully answered plaintiff's amended complaint herein, prays that this action be dismissed and that plaintiff take noth-

ing thereby, and that defendant do have and recover its costs and disbursements herein.

A. C. SPENCER,
ARTHUR A. MURPHY,
Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss

I, C. E. Cochran, being first duly sworn and upon oath, depose and say:

That I am assistant secretary of Oregon-Washington Railroad & Navigation Company, the defendant in the above-entitled cause, and that I have read the foregoing answer to plaintiff's amended complaint and know the contents thereof and that the same is true as I verily believe.

C. E. COCHRAN.

Subscribed and sworn to before me this 2d day of August, 1922.

[Seal] F. J. BETZ,
Notary Public for Oregon.

My commission expires February 13, 1924.

Service by copy admitted at Portland, Oregon, August 2, 1922.

VEAZIE & VEAZIE,
Solicitors for Plaintiff.

Filed August 3, 1922. G. H. Marsh, Clerk. [16]

AND AFTERWARDS, to wit, on the 8th day of August, 1922, there was duly filed in said court a reply, in words and figures as follows, to wit: [17]

In the District Court of the United States for the District of Oregon.

No. L.–8953.

UNION ASSURANCE SOCIETY, LTD., a Corporation,

Plaintiff,

vs.

OREGON–WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Reply.

Comes now the plaintiff and replying to the further and separate answer and defense of the defendant denies the same and each and every allegation thereof except that plaintiff admits that defendant owned a certain freight train propelled by its locomotives, which was run in an easterly direction over and along the tracks of the Spokane, Portland & Seattle Railway Company, passing McLaughlin, in the State of Washington, about noon of said day, and admits that said freight train was operated by engine crews and train crews of defendant; and plaintiff denies any knowledge or information sufficient to form a belief as to the number or designation of said train, or the numbers of the locomotives

propelling said train, or whether said freight train was operated subject to the orders of the train-dispatcher of the Spokane, Portland & Seattle Railway Company, or the rules and regulations of said company.

WHEREFORE, plaintiff prays for judgment as in its complaint herein.

VEAZIE & VEAZIE,
Attorneys for Plaintiff. [18]

State of Oregon,
County of Multnomah,—ss.

I, R. E. Menefee, being duly sworn, depose and say: That I am the attorney-in-fact within and for the State of Oregon of the above-named plaintiff Union Assurance Society, Ltd., and make this verification on its behalf; that I know the contents of the foregoing reply, and believe the same to be true.

R. E. MENEFEE.

Subscribed and sworn to before me this 8th day of August, 1922.

[Seal] J. C. VEAZIE,
Notary Public for Oregon.

My commission expires February 8, 1925.

District of Oregon,
County of Multnomah,—ss.

Due service of the within reply is hereby accepted in Multnomah County, Oregon, this 8th day of August, 1922, by receiving a copy thereof, duly certified to as such by J. C. Veazie, attorney for plaintiff.

ARTHUR A. MURPHY,
Of Attorneys for Defendant.

Filed August 8, 1922. G. H. Marsh, Clerk. [19]

AND AFTERWARDS, to wit, on the 15th day of June, 1923, there was duly filed in said court a verdict, in words and figures as follows, to wit: [20]

In the District Court of the United States for the District of Oregon.

No. L.–8953.

UNION ASSURANCE COMPANY, LTD., a Corporation,

Plaintiff,

vs.

OREGON–WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Verdict.

We, the jury empaneled to try the above-entitled action, find our verdict for the defendant.

Dated at Portland, Oregon, this 15th day of June, 1923.

E. M. BURNS,
Foreman.

Filed June 15, 1923. G. H. Marsh, Clerk. [21]

AND AFTERWARDS, to wit, on Friday, the 15th day of June, 1923, the same being the 86th judicial day of the regular March term of said court,—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding —the following proceedings were had in said cause, to wit: [22]

In the District Court of the United States for the District of Oregon.

No. L.–8953.

June 15, 1923.

UNION ASSURANCE SOCIETY, LTD., a Corporation,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation.

Minutes of Court—June 15, 1923—Trial.

Now, at this day come the plaintiff by Mr. J. C. Veazie, of counsel, and the defendant above named by Mr. A. A. Murphy, of counsel; whereupon, the jury impaneled herein being present and answering to their names, the trial of this cause is resumed. And said jury having heard the evidence adduced, the arguments of counsel and the charge of the Court, retire in charge of proper sworn officers to consider of their verdict. And thereafter, said jury returns to the court the following verdict, viz.:

"We, the jury empaneled to try the above-entitled action find our verdict for the defendant.

Dated at Portland, Oregon, this 15th day of June, 1923.

E. M. BURNS,
Foreman,"

which verdict is received by the Court and ordered to be filed. Whereupon

IT IS ADJUDGED that plaintiff take nothing by this action, and that defendant do have and recover of and from said plaintiff its costs and disbursements herein taxed in the sum of $46.20, and that said defendant do have execution therefor. [23]

AND AFTERWARDS, to wit, on the 22d day of October, 1923, there was duly filed in said court a bill of exceptions, in words and figures as follows, to wit: [24]

In the District Court of the United States for the District of Oregon.

No. L.–8953.

UNION ASSURANCE SOCIETY, LTD., a Corporation,

Plaintiff,

vs.

OREGON–WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

To the Honorable R. S. BEAN, District Judge:

The plaintiff in the above-entitled cause presents herewith its bill of exceptions, and prays that the

same may be settled, allowed and certified as provided by law.

VEAZIE & VEAZIE,
Attorneys for Plaintiff. [25]

In the District Court of the United States for the District of Oregon.

No. L.–8953.

UNION ASSURANCE SOCIETY, LTD., a Corporation,

Plaintiff,

vs.

OREGON–WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that the above-entitled cause came on regularly to be tried before the Honorable Robert S. Bean, District Judge, on Wednesday, the 13th day of June, 1923; the plaintiff appearing by Mr. J. C. Veazie, one of its attorneys, and the defendant appearing by Mr. Arthur A. Murphy, one of its attorneys. A jury being duly empaneled and sworn, the following evidence was introduced and the following proceedings were had, to wit:

The plaintiff introduced evidence tending to prove that at the time of the commencement of this action, and at all times mentioned in the complaint, it was a corporation, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with its principal place of busi-

ness at London, England, and duly licensed, admitted and qualified to transact the business of fire insurance within the State of Oregon; that on the first day of March, 1921, and thereafter, until and including the 11th day of September, 1921, the Spokane, Portland & Seattle Railway Company, a corporation, was the owner of five freight-cars of the type commonly known as box-cars, and designated respectively by the numbers 3164, 3287, 3187, 3041, and 3179; that on the first day of March, 1921, the plaintiff, for an adequate consideration, executed and issued to the Spokane, Portland & Seattle Railway Company its policy of insurance numbered 65037, wherein and whereby [26] the plaintiff insured the Spokane, Portland & Seattle Railway Company for the term of one year commencing on the first day of March, 1921, and ending on the first day of March, 1922, against loss or damage by fire to the said freight-cars in the sum of $750.00 on each of said freight-cars; that the said policy of insurance remained and was in full force and effect on the 11th day of September, 1921; that said policy of insurance was in the usual standard form of fire insurance policies, and contained, among other things, the following provision:

> "If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss be be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to

this company by the insured on receiving such payment."

Plaintiff introduced further evidence tending to prove that on the 11th day of September, 1921, said freight-cars were standing on a side-track of the Spokane, Portland & Seattle Railway Company near the main track of said company, near McLaughlin in the State of Washington, and that on said day the defendant, by its servants, agents and employees, ran over said main track and past said freight-cars a train composed of freight-cars and two locomotives, belonging to and operated by defendant; said train being an east-bound freight train which passed said point at about noon; and that by a fire which originated in dry grass near the said freight-cars immediately after the passage of said train, four of said freight-cars were destroyed, except for salvage of the wheels and other iron parts, and the fifth of said cars was damaged to the [27] amount of $56.49; and that the damae caused by said fire to said freight-car No. 3164 amounted to $924.25, and the damage so done to car No. 3287 amounted to $917.79, and the damage so done to car No. 3187 amounted to $921.37, and the damage done to car No. 3041 amounted to $908.61, and the damage to said car No. 3179 amounted to $56.49; and that under and by reason of its policy of insurance aforesaid, plaintiff paid to the Spokane, Portland & Seattle Railway Company $750.00 each on account of such loss and damage to the cars numbered 3164, 3287, 3187, and 3041; and the sum of $56,49 on account of such loss and damage to car numbered

3179; making the total so paid by plaintiff to the Spokane, Portland & Seattle Railway Company on account of such loss and damage the sum of $3056.49; and that in consideration of such payments, the Spokane, Portland & Seattle Railway Company made, executed and delivered to the plaintiff a certain instrument in writing, of which the following is a copy:

ARTICLE OF SUBROGATION.

BE IT KNOWN, That the Union Assurance Society, of London, did insure the Spokane, Portland & Seattle Railway Company, under its Policy No. 65037, issued at its Portland, Oregon, Agency, as follows: $3750.00 on box-cars #S. P. 3164, 3287, 3187, 3041, 3179, an equal amount on each, for one year, commencing on the first day of March, 1921, and continuing until the 1st day of March, 1922.

FURTHER, that on the 11th day of September, 1921, a fire occurred, by which the property so insured was damaged or destroyed to the amount of Three Thousand Seven Hundred Twenty-eight and 52/100 Dollars, said fire having been caused by sparks from locomotive of the Oregon-Washington Railroad & Navigation Company:

NOW THEREFORE, in consideration of Three Thousand Fifty-six [28] and 49/100 ($3,056.49) Dollars, to us in hand paid by the said Union Assurance Society, of London, in full settlement of our claim against said company, by reason of said loss, damage and policy of insurance 65037, do hereby assign, set over, transfer and subrogate to the said Union Assurance Society, of London, all the right, claim, interest, choses, or things in action, to the

extent of Three Thousand Fifty-six and 49/100 ($3,056.49) Dollars paid to us as aforesaid, which we may have against Oregon-Washington Railroad & Navigation Co., or any other party, person, or corporation, who may be liable, or hereafter adjudged liable for the burning or destruction of said property, and hereby authorize and empower the said Union Assurance Society, of London, to sue, compromise, or settle in our name or otherwise, and it is hereby fully substituted in our place and subrogated to all our rights in the premises to the amount so paid. It being expressly stipulated that any action taken by said company shall be without charge or cost to the Spokane, Portland & Seattle Railway Company.

SPOKANE, PORTLAND & SEATTLE RAILWAY CO.

By ROBT. CROSBIE,
Secretary.

Signed, sealed and delivered in presence of
J. C. McCOMB.
J. M. BALLINGALL.

Dated November 1, 1921.

Plaintiff introduced further evidence tending to prove that such payments were so made by plaintiff to the Spokane, Portland & Seattle Railway Company pursuant to a claim made by the Spokane, Portland & Seattle Railway Company against the plaintiff under said policy of insurance.

Plaintiff introduced further evidence tending to prove that at the time of the fire the weather was dry and the vegetation [29] adjacent to the tracks

of the Spokane, Portland & Seattle Railway Company was dry and inflammable, and that various other fires were observed to start upon or near the railroad right of way in the same vicinity soon after the passage of said train, and that the fire which destroyed these box-cars was seen to start in dry grass upon or adjacent to the right of way immediately after the passae of said train, and that said train was a train of about sixty-three freight-cars, and that the locomotives drawing the said train were laboring or puffing, and were throwing out hot sparks or embers at the time of passing the said freight-cars which were burned, and that there was no other fire or cause of fire in the vicinity which might account for the setting of the fire which burned these box-cars.

Thereupon, pursuant to notice given and demand made by the plaintiff, the defendant produced from its files a certain bill rendered by the Spokane, Portland & Seattle Railway Company on or about the 15th day of November, 1921, together with the voucher check given in payment therefor. The said bill was a bill rendered by the Spokane, Portland & Seattle Railway Company to defendant for damage to said freight-cars numbered 3164, 3287, 3187, 3041 and 3179 by said fire of September 11, 1921, and was in words and figures as follows:

Portland, Oregon, Nov. 15, 1921.

Oregon-Washington R. R. & Navigation Co.,
F. W. Sercombe, Auditor,
Portland, Oregon.

To Spokane, Portland & Seattle Railway Company, Dr.

Remit to Chas. C. Rose, Treasurer, Portland, Ore.
Department Memo. No. 22882.

FOR Value of SP&S Cars 3287, 3187, 3164 and 3041, which were destroyed, and cost of repairs to SP&S Car 3179, which was damaged by fire September 11th, 1921, at McLaughlin, Washington, due to sparks from [30] your coal-burning engine passing over our line under detour arrangements.

SP&S 3041, 40′ box-car, 80,000 capacity, of wood construction, built October, 1910.		
Weight 35,100 lbs.		
Reproduction value at .0512 per lb.	$1797.12	
Less depreciation 10 yrs. 11 mo. at 4% per annum	784.74	
Depreciated value	1012.38	
Less net value of salvage recovered	103.77	
Net loss	908.61	
Less amount recovered from insurance	750.00	
		$158.61

SP&S 3164, 40′ box-car, 80,000 capacity, of wood construction, Built October, 1910, weight 35,800 lbs.		
Reproduction value at .0512 per lb.	1832.96	
Less depreciation 10 yrs. 11 mo. at 4% per annum	800.39	
Depreciated value	1032.57	
Less value of net salvage recovered	108.32	
Net loss	924.25	
Less amount recovered from insurance	750.00	
		$174.25
SP&S 3187, 40′ box-car, 80,000 capacity, of wood construction, built October, 1910. Weight 35,400 lbs.		
Reproduction value at .0512 per lb.	1812.48	
Less depreciation 10 yrs. 11 mo. at 4% per annum	791.45	
Depreciated value	1021.03	

Less net value of salvage recovered	99.65	
Net loss	921.38	
Less amount recovered from insurance	750.00	
		$171.38
SP&S 3287, 40′ box-car, 80,000 capacity, of wood construction. Built October, 1910. Weight 35,000 lbs.		
Reproduction value at .0512 per lb.	1817.60	
Less depreciation 10 yrs. 11 mo. at 4% per annum	793.67	
Depreciated value	1023.93	
Less net value of salvage recovered	106.14	
Net loss	917.79	
Less amount recovered from insurance	750.00	
		$167.79
		$672.03
SP&S 3179, Net cost of repairs per Vancouver Shop Order #2609	56.49	
Less amount recovered from insurance	56.49	
		No charge.

Amount of this bill, $672.03.

The said bill was on February 7, 1922, receipted by the Spokane, Portland & Seattle Railway Company, said receipt showing payment [31] thereof; and the voucher check attached to said bill was a voucher check of the defendant in favor of the Spokane, Portland & Seattle Railway Company for the sum of $672.03, which was marked paid and canceled.

The plaintiff then offered in evidence the said receipted bill and voucher check, and in connection with the offer thereof, the following statements were made and the following proceedings were had:

Mr. VEAZIE.—Your Honor, the document which I have called upon counsel to produce from the files of the Oregon-Washington Railroad & Navigation Company and which is now offered in evidence is a bill rendered by the Spokane, Portland & Seattle Railway to the Oregon-Washington Railroad & Navigation Company for the difference between the loss on these cars and the amount of the insurance; the bill contains description of the cars, the amount of the loss, the amount of the credit as having been paid by insurance, and the balance, and the receipt of that bill; various memoranda on it showing the approval of the bill by the Oregon-Washington Railroad & Navigation Company, and the draft or voucher check given by the Oregon-Washington Railroad & Navigation Company to the Spokane, Portland & Seattle Railway Company in payment of that bill, and knowing that an argument is to come, I will give to your Honor the grounds on which I offer that, the theory.

It is offered as an admission of liability, and I might name numerous authorities on the question, but I think the one probably most in point is Weiss vs. Kohlhagen (58 Ore. 144), and it is laid down there as a general rule that a payment of one claim growing out of a certain transaction may be proved as tending to show [32] an admission of liability as to other claims growing out of the same transaction.

(Here counsel cited and discussed other authorities.)

Now, in this case it will be observed that we are dealing with not only the same fire, the same accident, but we are dealing with the identical same damage, that is with the same box-cars; four of these box-cars were destroyed and one of them was damaged. As shown by the testimony of Mr. Wager, the loss on the four cars destroyed was something in excess of nine hundred dollars each, while the insurance was only $750.00 each. Now, these documents which I am offering in evidence show that the Oregon-Washington Railroad & Navigation Company was called upon by the Spokane, Portland & Seattle Railway Company for that difference amounting to $672.03, and the Oregon-Washington Railroad & Navigation Company paid that bill. So I say, your Honor, that our case is clearer and stronger than the case of Weiss vs. Kohlhagen—clearer and stronger than any of the other authorities to which I have referred.

Mr. MURPHY.—If the Court please, counsel has been frank in his statement of what purpose he ex-

pects to accomplish by the introduction of these documents, that it is an admission of liability, and I think that would be the conclusion reached by the jury if they hear it and it seems to me that these are absolutely inadmissible because, in the first place, the rule that is contended for by counsel in the case is one that assumes that the parties in the same transaction are on a parallel, and that the action taken with respect to one is equally applicable to another, but in the case we have here the position with respect to the Spokane, Portland & Seattle Railway Company is not, in our opinion, identical [33] with the claims of the Insurance Company here because—and this refers back again to the clause of the detour agreement which counsel contends for and which he has pleaded in the complaint.

We contend, as I urged before your Honor before, that a careful reading of that language of the detour agreement set forth there is that we agree to protect them against loss or damage on claims made against them. The language, the pertinent part is "The Home Company"—that is, the Spokane, Portland & Seattle Railway Company—"shall not be held liable for or on account of any damage to the cars of either company"—I am omitting some of the words—"which may be incurred or sustained by reason of such trains being detoured * * * in whatever manner the same may be caused or occasioned, whether by or through the negligence of the Home Company, its agents or servants" or otherwise. "It being understood and

agreed that all risk of such damage shall be and is hereby assumed by the Foreign Company, and the Foreign Company shall and will hold harmless the Home Company from and against all liability or claim for all such * * * damage."

Now counsel contends that by virtue of that contract and his contract of insurance that he is entitled to claim the advantage of that. Now his policy of insurance, which he has introduced in evidence here, clearly contemplated that his right of subrogation depends, not upon any contractual relation whereby we might assume different contractual relationship, but upon a claim of neglect or negligence in the doing of an act which causes a loss, and lines, 102, 103, 104 and 105, Standard Form of policy which he introduced here, and under which he claims to have the right of subrogation say, "If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the [34] extent of such payment to all right of recovery by the insured for the loss resulting therefrom." From what? From the act or neglect of any person or corporation. "Such right shall be assigned to this company by the insured on receiving such payment."

Now counsel's statement supplements this policy with the clause of the detour agreement that I have referred to, where, by some other contract, in order to route our trains over their line, we went further and, although it might not be wholly our neglect—it might be contributory negligence on their part—

for some purposes we agree to protect them against some loss.

Now we would obviously not be liable if for example, as in this case is my contention, we constructed our trains in the proper manner, and equipped them with the proper spark-arresting devices, had them examined and maintained them in repair, they were carefully operated by competent employees with proper fuel, not overworking or overloading them; even though this fire occurred we are not on that account guilty of negligence because we have done everything. We are not insurers against fire. In other words, there must be some finding of negligence.

Now it is only by a finding of negligence—because it must be for loss caused or resulting from neglect on our part—that he can be subrogated under this policy.

Now the fact that we made a payment under our contract to the Spokane, Portland & Seattle Railway Company by virtue of our contractual relationship with it certainly is not on a parity with insurance companies claiming as subrogee under this policy. That is my first contention.

The second contention is this—and I don't think [35] the cases are applicable, the cases he cites. I think that is the usual rule of course that admission in one could be taken advantage of by another similarly situated, but I don't think, as I say, for the reasons I have urged upon your Honor, that he is similarly situated.

In the second place, it will be noted by this bill

that it specifies the particular cars and their value. It says depreciated value so much; less net value of salvage recovered so much; net loss so much; less amount covered recovered from insurance so much. Then there is a bill rendered for the balance.

Now it appears on the face of this bill that the Spokane, Portland & Seattle Railway Company in rendering the bill clearly contemplated that there had been other payments made which they were giving us credit for, and they were accepting from us in each case a lesser amount than the full loss that they sustained.

In other words, our payment was made on the assumption that it was a matter of compromise and was purely as a matter of compromise, and I do not think a compromise settlement can ever be taken advantage of, especially since the claim of the Insurance Company here is taken by virtue of rights, if any, which the Spokane, Portland & Seattle Railway Company had. In other words, if compromise is made with the Spokane, Portland & Seattle Railway Company for a lesser amount than their damage, the Spokane, Portland & Seattle Railway Company could not come into court in its own name and say by reason of your payment of the lesser amount, we will now take it as an admission of liability and recover the balance of the loss from you. And that is what counsel is attempting to do, it seems to me, in this case.

COURT.—Does that detour agreement obligate the [36] O. W. R. & N. Co. to pay the damages that might occur to the cars regardless of blame?

Mr. MURPHY.—Under rather peculiar wording, I don't believe it would amount to that. We got into quite a dispute about the effect of it before. It is set forth on page 3 of the amended complaint and it says: "The Home Company"—that is the Spokane, Portland & Seattle Railway—"shall not be liable for or on account of any loss, damage or delay to the trains, engines, cars or other property of any kind of either company." In other words, liability would not be imposed on the Spokane, Portland & Seattle on account of damage to cars or freight carried upon the detoured trains nor on account of any injuries to passengers or employees of either company "by reason of such trains being detoured, or by reason of such trains being delayed in such detouring, in whatever manner the same may be caused or occasioned, whether by or through the negligence of the Home Company, its agents or servants, or by reason of defects in the tracks, structures or facilities furnished by the Home Company, or otherwise, it being understood and agreed that all risk of such delay, loss, damage, injury and death,"—that is loss caused by reason of the detour —"shall be and is hereby assumed by the Foreign Company, and the Foreign Company shall and will"—that is the risk is assumed by us and they are not liable—"and the Foreign Company shall and will hold harmless the Spokane, Portland & Seattle Railway Company from all liability or claims for all such damage," and "will execute and deliver or cause to be executed and delivered to the Home Company upon request a full and complete

release, satisfaction and discharge of all claims therefor, and will pay or cause to be paid all costs and expenses incurred by either company in the clearing of the wrecks and repairs to equipment, track and property in which by reason of detour movements covered by this agreement, the engines, trains or cars of the Foreign Company are concerned."

Now right there we agree to pay, and that of course is a contractual relationship that has nothing to do with this policy of insurance; we pay the costs; pay all "costs and expenses incurred [37] by either company in the clearing of the wrecks and repairs to equipment, track and property in which by reason of detour movements covered by this agreement," their trains are concerned.

In other words, we agree, in order to use their track, that any repairs necessary to their equipment or property, and the clearing away of wrecks resulting by reason of the detour were to be paid and borne by us. Now, under that they bill us for the repairs or damages to these cars, noting that they have made certain other claims, and want to collect the balance from us, as I say their bill indicates on the face of it.

COURT.—Your position, Mr. Murphy, I understand is you made this payment by reason of your contract, and under your contract and not because of any admission of any negligence on your part.

Mr. MURPHY.—That is my point.

Mr. VEAZIE.—I think, your Honor, that is a very interesting admission. I had not intended to

bring up at this time the construction of that detour agreement, but I think counsel's statement and this bill and the payment of this bill are very persuasive as showing the construction which the railroad company itself puts upon the agreement. That is, as Mr. Murphy says, they pay this bill not because they admit negligence but because they admit that they did set the fire; they admit that the Spokane, Portland & Seattle suffered this loss, and they admit that under their detour agreement, regardless of the negligence, they are obligated to pay. Now, that is virtually conclusive, I think, of the construction of that detour agreement.

But to turn to the other points discussed by counsel. He seems to think that under the terms of that policy and under the law applicable to such cases, we cannot claim subrogation unless there was negligence. The policy says clearly if this company shall claim that the fire was caused by the act or neglect of another—there is the disjunctive—that this company, [38] the Insurance Company, on paying the loss shall be entitled to be subrogated.

Now, this fire was caused by the act of the Oregon-Washington Railroad & Navigation Company whether it was negligent or not; it was its act running its train upon that track and scattering sparks on the dry grass, so we come within the terms of the policy.

But now look at the subrogation agreement. I haven't it in my hands but it constitutes an absolute assignment to the Union Assurance Society, of any

and all causes of action which the Spokane, Portland & Seattle Railway Company may have against the Oregon-Washington Railroad & Navigation Company growing out of this fire up to the amount of the insurance, and so, regardless of the policy terms, the Spokane, Portland & Seattle Railway has seen fit to assign to this company that cause of action, and it is an assignable cause of action, your Honor, regardless of the law of subrogation. It is a cause of action for damage to property which, under our laws, is assignable, and it has been assigned; no matter whether it grows out of contract or implied; whether it grows out of the common law or the particular contractual relations of the parties, this cause of action is assignable and it has been assigned.

I don't admit that even under the general law of subrogation, apart from the language of this policy and the language of that assignment, the right of subrogation is confined to cases of negligence. I think the rule is otherwise. I think that where a fire insurance loss is paid to the person with whom the Insurance Company has a contract that, by operation of law, the Insurance Company is subrogated to such causes of action as the assured may have against any other person, whether resting upon contract or upon negligence, but the policy of insurance and the assignment seem to me to set all such questions as that at rest.

Now, about this document, counsel seems to find on [39] its face some evidence of compromise. I

say there is not only no evidence of compromise but a clear admission of liability to the fullest extent of the claim.

He bases his argument as to compromise upon the idea that the Spokane, Portland & Seattle Railway Company had recovered part of this loss from the Insurance Company. Of course, the Insurance Company had paid $750.00 on each of these cars, and it would not have been an act of honesty for the S. P. & S. to try to collect that again from the O. W. R. N. Co. They didn't so attempt; it attempted to collect exactly the amount that remained due to it, that is to say the excess of the loss over the insurance, and it left the O. W. R. & N. Co. and the Insurance Company to deal with each other as to the three thousand odd dollars which the Insurance Company had paid. There was no compromise and no suggestion of compromise. There was no suggestion of any waiver of any right as to this insurance money. In fact, the Spokane, Portland & Seattle could not have waived that if it had tried to do so, and all in all it seems to me very clear that under the doctrine of the authorities that I have cited that this is admissible.

Now, as to the construction of this detour agreement, I had supposed that would come out later, but since the argument has been commenced, I am willing that that question should be discussed fully, and I am aided by the construction which counsel has placed upon it, and the construction which the company has placed upon it. They say they have

paid this money to the Spokane, Portland & Seattle not because they were negligent but because the detour agreement compelled them to do so, and so it did. In reading that agreement, the portion of it that appears on page 3 of the complaint, your Honor will see that it is very closely knit—the words are made to count. There is [40] not any repetition of the same idea, but one phrase, or one expression is not a repetition or a division of another phrase or expression, and it will bear close analysis upon the theory that every word has a meaning, and in that point of fact I wish to call your attention to a few expressions. "The Home Company shall not be held liable for or on account of any loss, damage or delay to the trains, engines, cars or other property of any kind of either company." The Home Company then shall not be held liable on account of any loss, damage or delay to its own property is what that means. But go a little further. "It being understood and agreed that all risk of such delay, loss, damage, injury and death shall be and is hereby assumed by the Foreign Company." Now, it is to be borne in mind that we are talking about risk of damage to property of the S. P. & S., the Home Company, shall be assumed by the Foreign Company, the O. W. R. & N. Co. What can that mean? It cannot mean that the Oregon-Washington Railroad & Navigation Company is to assume the liability of the Spokane, Portland & Seattle to somebody else. It can, as applied to the property of the Spokane, Portland & Seattle, only mean that the Oregon-Washington Railroad & Navigation Com-

pany, as the Foreign Company, shall be liable for or shall make good any loss which the Spokane, Portland & Seattle, the Home Company, may suffer to its own property through the detour movement of the Foreign Company. If it has not that meaning it has no meaning whatever.

Then go on a little further down. The Foreign Company "will pay or cause to be paid all costs and expenses incurred by either company in the clearing of the wrecks and repairs to equipment, track and property in which by reason of detour movements covered by this agreement, the engines, trains or cars of the Foreign Company are concerned." Now that means literally and explicitly [41] that the Oregon-Washington Railroad & Navigation Company, the Foreign Company, will make or pay for all repairs to the property of the Spokane, Portland & Seattle Company, which may be caused by any act of the Oregon-Washington Railroad & Navigation Company trains in connection with the detour. Counsel himself has stated that, within the meaning of that clause, the restoration of payment for those cars is within the meaning of repairs. The cars were not totally destroyed; there was some salvage in each case. And the word "repairs" if there were no more in the agreement, might reasonably be construed as covering this case, but, your Honor, it would be exceedingly strange if, finding on the face of that agreement, and express agreement, and express stipulation requiring the Oregon-Washington Railroad & Navigation Company to repair damage to equipment at its own ex-

pense, we should construe the remainder of the agreement so that the Spokane, Portland & Seattle Company would be required to bear the loss resulting from the total destruction of the car.

All in all, in view of the meaning of the detour agreement on its face, the very construction of it on its face, the construction which the parties have given it in this particular matter, and the construction which counsel himself puts upon it, it seems to me clear that under that detour agreement the Oregon-Washington Railroad & Navigation Company is bound to the Spokane, Portland & Seattle Railroad Company and therefore to us as the assignee of the Spokane, Portland & Seattle Company for its damage, regardless of the question of negligence. That has, I take it, only a collateral bearing on the question of the admissibility of this exhibit now offered, but I feel the admissions of counsel himself are sufficient to show that the evidence is competent.

Mr. MURPHY.—If you follow counsel's argument to its conclusion, your Honor, all that he would have to do under his policy would be to say that when any fire occurred we were detouring [42] cars over that line.

Mr. VEAZIE.—No, that you caused the damage. We have to show that.

Mr. MURPHY.—How do you mean caused? You don't mean negligence?

Mr. VEAZIE.—No.

Mr. MURPHY.—You make some distinction as between causing it and willfully causing it, as be-

ing responsible for it, as being an action on which you might have a cause of action independent of the contractual relationship?

Mr. VEAZIE.—No, I mean to say physically the act which brought about the damage; in this case you set the fire which destroyed these cars.

Mr. MURPHY.—If the Court please, there are very few fires that occur, except forest fires which occur out where lightning strikes that are not caused by somebody. A man wires your house and does a poor job, and the wires are left open, which causes a fire; a man drops a match or something. All fires are caused, except the fires which occur through nature, as I understand. Now, I don't understand the law in this state says we are an insurer, in other words, that we are responsible in any event.

COURT.—Suppose you have agreed in your detour contract to take care of this loss if you caused it, regardless of your own negligence.

Mr. MURPHY.—Then of course we would be bound to pay.

COURT.—Assuming that is the effect of the detour agreement, then would not this company be subrogated to the rights of the Home Company, as it is called in this contract, by virtue of this assignment, regardless of their policy?

Mr. MURPHY.—It is my contention, your Honor, that they cannot take the same right for two reasons. In the first place [43] I cited to your Honor some cases before. I have a memo-

randum but I haven't the authorities here. One case as I recall it was an express holding against it from New York. In that case the contractor had entered into an agreement with the owner of a building whereby he would protect the owner of the building from a loss due to his efforts, and I think—I haven't read the case recently; I can give the citation to it—he injured one by the falling of some bricks, and the contractor made certain payments or did certain things to the owner under his contract of indemnity, and it was claimed there as it is claimed here that that right passed to—I believe an indemnity company of the contractor, and the Court expressly stated that it is not such an agreement as would pass under the insurance policy and of which he could avail himself.

COURT.—The question I asked was what effect is to be given to this assignment or transfer of the cause of action that the railroad company delivered to the insurance company.

Mr. MURPHY.—I think it could only go to the transfer of the course that they could pursue against us if it were caused by negligence.

COURT.—Suppose your company had not made any payment at all in this matter, and the Home Company had assigned its claim to John Smith. Could he have maintained an action against you under this detour agreement?

Mr. MURPHY.—If they had assigned the right of action under the detour agreement?

COURT.—Their claim against your company, whatever it is?

Mr. MURPHY.—I don't know whether—if they had made an assignment under the detour agreement whether they would have had the right to sue us and claim by virtue of the contract or not. However, it does not seem to me that is the case.

COURT.—What I had in mind, if I am not interrupting— [44] the plaintiff has offered in evidence and there has been admitted in evidence an assignment by the Home Company, by the S. P. & S. Co., to the Insurance Company of its claim against your Company.

Mr. MURPHY.—Made pursuant to a demand under the terms of the insurance policy.

COURT.—The language of that is quite broad.

Mr. MURPHY.—Yes, but counsel himself says was made under the terms of the policy.

COURT.—Yes, after they made demand under the policy for payment, they assigned it. The company is not claiming in this case alone under the doctrine of subrogation but by virtue of the provisions in this policy.

Mr. MURPHY.—Insurance company?

COURT.—Yes.

Mr. MURPHY.—No, counsel set that up, and I argued against it, and your Honor stated you thought it was explanatory of the circumstances under which we moved our trains. You did not pass upon the proposition as to whether or not—

COURT.—The detour agreement?

Mr. MURPHY.—The detour agreement—whether or not under the detour agreement they would have the right. It is my contention they wouldn't have,

if made pursuant to a demand under the insurance policy, and even though it might be broad enough to include a right under the detour agreement, yet they didn't have any right to claim it except in accordance with the terms of the policy, and to that extent they had to show some negligence which would be actionable in law.

And further there is the other feature, as I say, that as far as this payment is concerned it shows clearly that it is for less loss than that actually sustained—that it is made upon the proposition there had been a recovery. Counsel says [45] that fair dealing on the part of the Spokane, Portland & Seattle Railway Company would compel them to state that. That is true; fair dealing would, but they give credit on account of the loss for the moneys that they have recovered, and after showing that fact they don't say they will take the $179.00 and leave the $750.00 outstanding, but they put it as a credit and give them less than the amount due. That was on the assumption that the Oregon-Washington Railroad & Navigation Company would have the benefit of the salvage as well as the insurance which they have on their property; in other words, it was loss sustained by the Home Company. We were to protect them against loss, and they didn't lose because they had paid their premiums and recovered their insurance, and we paid them a lesser amount with the understanding that we would not pay further, so I think from that feature of it, being in the nature of an expression of compromise instead of expression of liability, it

should not be admitted because admittedly whether they would take under the detour agreement or whether they would take under the policy of insurance this claimant stands, as far as the subrogated rights are concerned, in the shoes of the Spokane, Portland & Seattle Railway Company, and it couldn't obviously claim on any different terms from that. Whether it has all its rights or not may be a question, but it certainly could not claim beyond the obligation of the Spokane, Portland & Seattle Railway Company. So I say, suppose after the fire had occurred this insurance company had rendered us a bill such as I hold here, saying that by virtue of these cars having been damaged on account of our act, that they rendered us a bill for $673.02, and we paid the insurance company that sum, could they then turn around and say that because we paid that sum we had admitted responsibility on the balance of the account, where they had shown that they had given us credit for the balance on their own bill? [46]

COURT.—The Court is of the opinion that the objection to the evidence offered by the plaintiff is well taken. The Spokane, Portland & Seattle Railway Company and the Insurance Company do not occupy the same relationship to the defendant company, and therefore the evidence would not be admissible on the theory that they are in the same position. The defendant company was using the line of the Spokane, Portland & Seattle Railway Company under a written agreement between them and that agreement fixed their rights and liabilities,

one to the other, so that any adjustment of their affairs would be under and in pursuance of that agreement or such interpretation as the parties may have given that agreement. This case, however, as I understand the record and pleadings, is based upon the charge of negligence. It is charged in the complaint that through the negligence and carelessness of the defendant company this property was destroyed, and that by reason of that fact the insurance company was compelled to and did pay a certain sum of money to the assured, and it is that sum it is seeking to recover in this action, and under this complaint it seems to me quite clear the action must proceed on the charge of negligence and not by reason of any agreement or understanding between the two companies concerning the occupation of this line. For that reason the objection will be sustained.

Mr. VEAZIE.—I will save an exception to the ruling and while it may be useless for me to reopen that question, the view your Honor has taken, was not it based on the argument that the complaint is based wholly on negligence? If I might be permitted to say a word on that.

COURT.—I have taken the language of the complaint for its face value.

Mr. VEAZIE.—I think, your Honor, that the complaint is [47] capable of the construction that it is founded not only upon negligence but upon the contract and I think that theory was fully brought out when the complaint was under consideration on the motion of counsel to strike out por-

tions of it. There were motions made to strike out these allegations here on page 3 containing a portion of the contract between the two companies, and the matter was gone into at considerable length at that time, and I thought it was clear at that time that the complaint was in a double aspect and that we could rely on both aspects of the complaint in the absence of any motion to require us to elect, and I don't believe a motion to elect would be permissible.

Now it is true the complaint contains allegations of negligence, but in the third paragraph we set up this contract for the express purpose of showing that under its terms the Foreign Company assumed liability regardless of negligence. That was the sole purpose of that allegation, to bring that contract into the case. That set up that the train was being operated under and pursuant to that contract, and while we do set up allegations tending to show negligence, I do not believe that they overcome the obvious effect or construction of pleading the contract liability and we allege that the fire was caused by the defendant, and that they set these very cars on fire, destroyed three of them and damaged the fourth, and then in the last paragraph on page 5 we allege that upon payment by plaintiff to the Spokane, Portland & Seattle Railway Company of said sum of $3,056.49 as aforesaid, and in consideration thereof, the Spokane, Portland & Seattle Company did assign, set over, transfer and subrogate" its cause of action for and on account of loss and damage of the freight-cars. I don't say we set

up a cause of action only on account of negligence. We have set up a cause of action which would be complete in itself regardless of the negligence; we have set up also [48] a cause of action on the negligence. I think reading the complaint you will find it contains a complete statement of the cause of action based upon this contract liability. That has been our theory from the beginning. In the argument of the motion to strike out we took that ground so it is no surprise to counsel.

COURT.—I looked at the record and everything that was filed at the time that motion was disposed of and it was overruled on the theory that this allegation explains the reason why the Oregon-Washington Railroad & Navigation Company was using that line at that time, but I am unable to construe this complaint in any way other than an action for negligence, because if it had been brought on the assignment claim it would simply have been alleged in straight language that the defendant company by reason of the contract incurred liability, and that that liability had been assigned to the Insurance Company and the question of negligence would not have been alleged in the complaint, so I am constrained to hold that this is based upon negligence as it stands now.

Mr. VEAZIE.—I ask for an exception.

COURT.—Yes, you may have your exception.

The defendant then introduced evidence tending to show that its locomotives were properly and skillfully constructed, equipped and operated and had the appliances and devices of the best and most

approved character to prevent escape of dangerous sparks or embers, and that said locomotives were inspected frequently and kept in good order, and that the spark-arresting devices on said locomotives were found to be in good order on the day prior to this fire, and that the escape of a certain amount of sparks capable of setting fire to dry vegetation cannot be avoided in the practical operation of coal-burning [49] locomotives, and that at the time and place of the setting of this fire the locomotives of defendant were not overloaded and were not proceeding at an unusually high rate of speed, or laboring heavily, or otherwise being so operated as to cause the escape of quantities of sparks in excess of the quantities ordinarily to be expected under normal and careful operation.

Before the commencement of the argument to the jury and before the giving of the instructions of the Court to the jury, the plaintiff submitted in writing a request that the Court give to the jury certain instructions, which, according to the practice of the Court, were numbered and stated separately; and among the instructions so requested was the following, which was numbered 4:

> "It is admitted by the pleadings that the defendant was operating this train over the tracks of the Spokane, Portland & Seattle Railway Company under a written agreement, which contained certain provisions alleged in the complaint and admitted by the answer. I instruct you that under those provisions, the defendant assumed liability to the Spokane,

Portland & Seattle Railway Company for any damage which might be done to the property of the Spokane, Portland & Seattle Railway Company through the operation over its tracks of the defendant's trains; and the plaintiff as assignee of the Spokane, Portland & Seattle Railway Company, is therefore entitled to your verdict, if you find that defendant's locomotives set this fire, even though you may believe that defendant was not negligent."

The said request was refused, and to such refusal the plaintiff took an exception in the language hereinafter set forth.

The Court gave to the jury the following instructions, and exceptions thereto were taken as follows: Gentlemen of the Jury: [50]

Instructions of Court to the Jury.

On the 11th of September, 1921, certain box-cars belonging to the Spokane Portland & Seattle Railway Company and located on a spur at McLaughlin Station two miles east of Vancouver were destroyed or injured by fire. The plaintiff company had issued a policy in favor of the Spokane, Portland & Seattle Railway Company to cover such loss and after the fire it had an adjustment with the company and paid for the loss up to and including the extent of its policy amounting in the aggregate to $3,056.49. This amount it now seeks to recover in this action from the defendant railway company on the ground and for the reason that the origin of the fire was due to the negligence and carelessness of the defendant company in the operation of a train over the line of the Spokane, Portland & Seattle Com-

pany. If, as a matter of fact, the loss was due to the negligence and carelessness of the defendant company, the plaintiff would be entitled to recover in this case, and the first question therefore for you to determine will be whether the fire which destroyed and injured these cars was caused by sparks or fire escaping from the defendant's engine.

The evidence shows, and it was not controverted, that one of the defendant's freight-trains passed by this point going east a few minutes or a short time before the fire occurred, and it is claimed by the plaintiff that the fire originated from sparks or fire escaping from the engine propelling that train. The answer of the defendant denies that it was [51] responsible for the fire, or that it occurred by reason of its carelessness or negligence, or by sparks or cinders or coals escaping from its engine.

Now, in that connection and in determining this question you will consider the evidence bearing on that point and the natural inferences to be drawn from it. You may consider the time the fire occurred with reference to the passing of the defendant's train, the proximity or distance of the place of origin of the fire from the railroad track, the nature and location of the inflammable material in which the fire started, the absence of other sources from which the fire might reasonably be found from the evidence to have originated, the occurrence of other fires under like circumstances in the same vicinity which started soon after the passing of this train, and in such manner that they might reasonably be attributed to it, if you find from the

evidence that there were other such fires and all the other circumstances disclosed by the evidence bearing upon the probability that the fire which destroyed these box-cars was started by the locomotive of the defendant. It is not necessary that plaintiff should prove that a spark or cinder from this locomotive was actually seen to start this fire. It is sufficient if the preponderance of the evidence leads you in the exercise of reasonable judgment, to the belief that the fire was caused by the defendant's locomotive.

Where a fire is discovered on or along the right of way of a railroad company about the time or soon after the passage of a train, and there is no [52] other probable explanation of its origin, the jury will be justified in inferring or believing that it was started by fire from the engine, and so in this case, if you believe these fires were discovered along the right of way soon after the passage of the train of the defendant company, and there is no other reasonable explanation appearing from the testimony as to the origin of the fire, you would be justified in believing as a matter of fact that the fire was caused by the sparks or cinders or coal from the engine.

This is a question for you to determine from the testimony, and you can determine it from the evidence as it appears to you and as you understand it. If you do not believe from the preponderance of the evidence that the fire was caused by sparks or cinders escaping from the engine of the defendant

company, then of course the plaintiff would not be entitled to recover.

If you do so believe, it will then be necessary for you to proceed to examine the question as to whether the company was negligent in allowing these sparks or coals to escape from the engine, and whether such negligence was the proximate cause of the injury.

The mere fact that a fire occurred and that it might have originated from the defendant's locomotive is not of itself sufficient to entitle the plaintiff to recover. It must further appear that the negligence on the part of the defendant was in one or more of the particulars set forth in the complaint, and the complaint alleges in substance that the negligence [53] consisted in operating an engine without proper equipment, without proper appliances to prevent the escape of fire, and with an overloaded train, and in other particulars you will observe in the complaint.

A railway company in operating its road or a train over a road has a right to use engines propelled by the use of fire and steam and in doing so the duty devolves upon it of using reasonable care to so operate them as to do as little damage as practicable to property along and adjacent to the right of way on account of escape of fire from its engines. It is also its duty to exercise reasonable care in obtaining and equipping the engine used by it with the most approved appliances to prevent the escape of fire and to keep such appliances and the engines and equipment—or to exercise reasonable

care to keep them in good repair and when operating the engines to provide skillful and competent servants to operate the same.

If you find that the fire from which the damage in this case ensued was caused by sparks or cinders emitted from the locomotive of the defendant company, and that such damage resulted to the plaintiff as alleged in the complaint, an inference or presumption of negligence arises against the defendant in the construction, management and repair of its engines and unless such evidence is overcome by evidence on the part of the defendant showing to your satisfaction that its engines at the time of the fire were properly equipped and constructed, and that it had exercised [54] ordinary and reasonable care to provide and put into use approved appliances for arresting sparks and cinders and preventing the escape of fire, and that the engine was properly operated and with skillful and competent employees, and was in good repair, it will be your duty to find for the plaintiff in such sum as is shown in this case. In other words, it is sufficient to establish a *prima facie* case upon the part of the plaintiff for it to show that the fire was communicated from the engine of the defendant to the property destroyed in this case, resulting in the damage or destruction thereof, and with such proof arises a presumption of negligence in the construction or management of the engine or that it was out of repair, and casts upon the defendant the burden of rebutting and overcoming such presumption by competent and satisfactory evidence.

In overcoming this presumption it is the duty of the defendant company to satisfy you by a preponderance of the evidence that the locomotive was properly equipped, handled and operated, and that due care and caution had been exercised by the company in its construction and equipment and in keeping it in repair so as to prevent the emission of sparks and fire as far as that end could be obtained by reasonable care without impairing the efficiency of the locomotive. If there was no defect in the engine and it was in good repair, and if the defendant had exercised reasonable care to keep it in reasonable and good condition so as to prevent the escape of live cinders or coals while it was being operated, and [55] the engine was operated with ordinary care and skill under the circumstances, and a fire occurred and communicated to the property in question, the defendant would not be liable.

It is not possible to propel steam locomotives in such a manner as to absolutely prevent the emission of sparks of fire in their operation. The law does not require that engines used in the manner that defendant used the same shall be so constructed, equipped and managed that no sparks shall escape from them, and as sparks will be emitted—ordinary and usual quantity—that is to say such quantity as naturally would be emitted from an engine upon which the defendant shall have used reasonable care, diligence and precaution in equipping with modern and approved spark-arresting devices, and shall have operated in its usual course of business by competent employees, and if fire occurs from such

sparks the defendant would not be liable. All the law requires of it is the exercise of ordinary and reasonable care, such care as an ordinarily reasonable person engaged in such business, and under all the circumstances would have exercised, and if it does that then it has discharged all the duties the law imposes upon it.

It is not an insurer. It does not guarantee nor is it required to quarantee that no fire shall issue from the engine, or no sparks will issue from it, but it is required to exercise reasonable care to provide the engine with the latest improved devices to prevent the escape of fire and sparks, and to keep such appliances in repair, and to [56] provide skillful and competent servants to operate its engines and to see that they operate them in a skillful and proper manner so that fire will not escape.

When it has done all this then it has discharged the duty the law imposes upon it and would not be liable, but if it fails to do so it is liable for the consequences of its negligence. Therefore if the fire in this case was communicated from the engine of the defendant company, but from the preponderance of the evidence you believe it exercised the care and diligence that I have pointed out to you in the equipment and repair of its engine and appliances intended to prevent the escape of sparks, cinders and coals, and that the employees exercised reasonable and ordinary care in the operation of this engine, then, even though you do find that the fire was caused by the engine of the defendant

company under such circumstances, it would not be liable because it would not be negligent, but if it did not do so it would be responsible for the consequences of its negligence.

As I have said to you a moment ago, the fact that fire escaped from an engine and communicated to the adjoining property is sufficient to impose the burden upon the defendant company to show that it did not escape through its carelessness or negligence in the maintenance or operations of its engines.

Now, there has been something said in this case about the condition of the right of way of the Spokane, Portland & Seattle Railway Company. There [57] is evidence tending to show that there was inflammable material along that right of way. That fact, if it is a fact, should be considered by you in determining whether or not the defendant company exercised ordinary and reasonable care to equip and maintain its engines in proper condition to prevent the escape of fire, and if it did not do so and fire escaped by reason of its negligence it would be no defense in this action that the right of way of the Spokane, Portland & Seattle Company was covered with inflammable material. The issue in this case is whether or not this fire was due to the negligence and carelessness of the defendant company. If it was then it is responsible. If it was not then it is not responsible.

Now, the questions in this case are questions of fact, and they are exclusively for you to determine. You are the exclusive judges of all questions of

fact, and if at any time during the progress of the trial the Court has indicated or intimated its views as to any question of fact or as to what a witness testifies, you are to disregard it and find the facts according to the testimony as you understand it.

Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which a witness testifies, by his appearance upon the witness-stand. You are not bound to find your verdict in conformity with the testimony of the greater number of witnesses against the lesser, but you must find it in accordance with the reasonable preponderance of the testimony as you understand it, and in [58] doing so you are to apply to the testimony given in this case your own experience and your own good judgment.

Now, the amount involved in this case is not in controversy. There is no dispute but what the insurance company paid to the Spokane, Portland & Seattle Railway Company the money that it is seeking to recover in this case, so if it is entitled to recover at all it is entitled to recover in the full amount prayed for.

Mr. MURPHY.—Will the Court allow an exception to the refusal to give the instructions asked for?

The COURT.—Which ones?

Mr. MURPHY.—I submitted one about the use of coal—Instructions 16 and also 15, I believe neither one of which your Honor gave.

COURT.—I suppose it is unnecessary to say to the jury that they are to find and determine in

this case upon the evidence as given on the trial and not the opening statements of counsel on either side; so that any statement counsel on either side may have made in the opening address and has not substantially supported by testimony are to be disregarded by the jury. It is true and a fact that the railroad company has a lawful right to use coal in operating its engines.

Mr. MURPHY.—I think perhaps I misunderstood at the start of your instructions; your Honor in discussing the matter of the origin of the fire said that it was sufficient if the testimony showed that the fire was started from our locomotive. Later you [59] amplified that by saying that it had not only to come from our locomotive but occurred through negligence. It seemed at the time I heard it that the jury might be misled by the word "sufficient."

COURT.—I think the jury will understand from the instructions that there must not only be evidence that the fire started from the defendant's engine but was due to their negligence and carelessness.

Mr. VEAZIE.—I presume that is not intended to modify the instructions already given to the effect that the occurrence of the fire if traced to the railroad—

COURT.—There arises a presumption that has to be overcome by the defendant.

Mr. VEAZIE.—I think your Honor did not give any part of my requested instruction No. 5. The point that I wish to make in that connection is as

to the degree of care depending upon the circumstances; what will constitute reasonable care under one set of circumstances might not be reasonable under another.

COURT.—I attempted to cover that; I don't know whether I did or not. The jury will understand that by the term "reasonable care" is meant such care as a reasonably prudent person would exercise under similar circumstances.

Mr. VEAZIE.—I will ask an exception to the failure to give instruction requested No. 4.

Mr. MURPHY.—May I have exception to failure to give our No. 4, which has to do with the failure of the Spokane, Portland & Seattle Railway Company to clear its right of way.

Upon the conclusion of the instructions to the jury, the jury retired for deliberation, and thereafter returned a verdict in favor of the defendant. [60]

In the District Court of the United States for the District of Oregon.

No. L.–8953.

UNION ASSURANCE SOCIETY, LTD., a Corporation,

Plaintiff,

vs.

OREGON–WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Order Settling Bill of Exceptions.

United States of America,
State and District of Oregon.—ss.

I, R. S. Bean, the Judge before whom the above-entitled cause was tried, do hereby certify that the foregoing bill of exceptions was served and presented within the time and in the manner provided by law and by the rules and orders of the Court; that thereafter the defendant presented and filed certain proposed amendments to the said bill of exceptions, and the said proposed amendments came on duly to be heard, the plaintiff appearing by Mr. J. C. Veazie, one of its attorneys, and the defendant appearing by Mr. Arthur A. Murphy, one of its attorneys; and upon such hearing the said amendments were allowed in part and denied in part; and in so far as allowed, have been incorporated in and form part of the foregoing bill of exceptions as now certified, and the said bill of exceptions, as so amended and as hereinbefore set forth, is hereby allowed and settled, and certified as the true bill of exceptions in the above-entitled cause, and is hereby made a part of the record herein; and the Clerk is hereby directed to file the same.

Dated this 22d day of October, 1923.

R. S. BEAN,
Judge.

District of Oregon,
County of Multnomah,—ss.

Due service of the within bill of exceptions is

hereby accepted in Portland, Multnomah County, Oregon, this 14th day of August, 1923, by receiving a copy thereof, duly certified to as such by J. C. Veazie, of attorneys for plaintiff.

ARTHUR A. MURPHY,
Of Attorneys for Defendant.

Filed October 22, 1923. G. H. Marsh, Clerk. [61]

AND AFTERWARDS, to wit, on the 13th day of December, 1923, there was duly filed in said court a petition for writ of error, in words and figures as follows, to wit: [62]

In the District Court of the United States for the District of Oregon.

No. L.–8953.

UNION ASSURANCE SOCIETY, LTD., a Corporation,

Plaintiff,

vs.

OREGON–WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Petition for Writ of Error and Supersedeas.

The Union Assurance Society, Ltd., plaintiff in the above-entitled case, feeling itself aggrieved by the verdict of the jury and the judgment entered therein on the 15th day of June, 1923, whereby it was adjudged that plaintiff take nothing by this action and that defendant have judgment against

the plaintiff for its costs and disbursements, taxed at $46.20, comes now by Veazie and Veazie, its attorneys, and petitions said Court for an order allowing said plaintiff to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit; and also that an order be made fixing the amount of security which the plaintiff shall give and furnish upon said writ of error, and that upon the giving of such security, all further proceedings in this court be suspended and stayed until the determination of such writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will forever pray.

VEAZIE & VEAZIE,
J. C. VEAZIE,
Attorneys for Plaintiff.

Filed December 13, 1923. G. H. Marsh, Clerk. [63]

AND AFTERWARDS, to wit, on the 13th day of December, 1923, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [64]

In the District Court of the United States for the District of Oregon.

No. L.–8953.

UNION ASSURANCE SOCIETY, LTD., a Corporation,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Comes now the plaintiff and files the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above-entitled cause, as follows:

I.

That the United States District Court for the District of Oregon erred in excluding from evidence and from consideration by the jury, and in refusing to admit in evidence in said cause that certain written instrument offered in evidence by the plaintiff and hereinafter set forth, together with the voucher-check thereto attached, being a voucher-check of the defendant in favor of the Spokane, Portland & Seattle Railway Company for the sum of $672.03 which was marked "paid and cancelled," said instrument being a bill of the Spokane, Portland & Seattle Railway Company against the de-

fendant and being receipted so as to show payment by the defendant on or about the 7th day of February, 1922, and said instrument or bill being in words and figures, as follows:

Portland, Oregon, Nov. 15, 1921.

Oregon-Washington R. R. & Navigation Co.,
F. W. Sercombe, Auditor,
Portland, Oregon.

To Spokane, Portland & Seattle Railway Company, Dr.

Remit to Chas. C. Rose, Treasurer, Portland, Ore.
Department Memo. No. 22882.

For value of SP&S Cars 3287, 3187, 3164 and 3041, which were destroyed, and cost of repairs to SP&S Car 3179, which was damaged by fire September 11, 1921, at McLaughlin, Washington, due to sparks from your coal burning engine passing over our line under detour arrangements. [65]

SP&S 3041, 40′ box-car, 80,000 capacity, of wood construction, built October, 1910.	
Weight 35,100 lbs.	
Reproduction value at .0512 per lb.	$1797.12
Less depreciation 10 yrs. 11 mo. at 4% per annum	784.74
Depreciated value	1012.38
Less net value of salvage recovered	103.77
Net loss	908.61

Less amount recovered from insurance	750.00	
		$158.61
SP&S 3164, 40′ box-car, 80,000 capacity, of wood construction, Built October, 1910, weight 35,800 lbs.		
Reproduction value at .0512 per lb.	1832.96	
Less depreciation 10 yrs. 11 mo. at 4% per annum	800.39	
Depreciated value	1032.57	
Less value of net salvage recovered	108.32	
Net loss	924.25	
Less amount recovered from insurance	750.00	
		$174.25
SP&S 3187, 40′ box-car, 80,000 capacity, of wood construction, built October, 1910. Weight 35,400 lbs.		
Reproduction value at .0512 per lb.	1812.48	
Less depreciation 10 yrs. 11 mo. at 4% per annum	791.45	
Depreciated value	1021.03	

Less net value of salvage recovered	99.65	
Net loss	921.38	
Less amount recovered from insurance	750.00	
		$171.38
SP&S 3287, 40′ box-car, 80,000 capacity, of wood construction. Built October, 1910. Weight 35,000 lbs.		
Reproduction value at .0512 per lb.	1817.60	
Less depreciation 10 yrs. 11 mo. at 4% per annum	793.67	
Depreciated value	1023.93	
Less net value of salvage recovered	106.14	
Net loss	917.79	
Less amount recovered from insurance	750.00	
		$167.79
		$672.03
SP&S 3179, Net cost of repairs per Vancouver Shop Order #2609,	56.49	
Less amount recovered from insurance	56.49	
		No charge.

Amount of this bill is $672.03.

II.

That the said Court erred in refusing to give to the jury the instruction requested in writing by plaintiff and being by it numbered 4 and which was in words as follows, to wit: [66]

> "It is admitted by the pleadings that the defendant was operating this train over the tracks of the Spokane, Portland & Seattle Railway Company under a written agreement, which contained certain provisions alleged in the complaint and admitted by the answer. I instruct you that under those provisions, the defendant assumed liability to the Spokane, Portland & Seattle Railway Company for any damages which might be done to the property of Spokane, Portland & Seattle Railway Company through the operation over its tracks of the defendant's trains; and the plaintiff as assignee of the Spokane, Portland & Seattle Railway Company, is therefore entitled to your verdict, if you find that defendant's locomotive set this fire, even though you may believe that defendant was not negligent."

III.

That the Court erred in rendering judgment in the said cause in favor of the defendant and against the plaintiff.

WHEREFORE, the said plaintiff prays that the judgment of the District Court of the United States for the District of Oregon in this cause be reversed

and for such further relief as may be proper in the premises.

VEAZIE & VEAZIE,
J. C. VEAZIE,
Attorneys for Plaintiff.

Filed December 13, 1923. G. H. Marsh, Clerk. [67]

AND AFTERWARDS, to wit, on Thursday, the 13th day of December, 1923, the same being the 32d judicial day of the regular November term of said Court,—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [68]

In the District Court of the United States for the District of Oregon.

No. L.–8953.

UNION ASSURANCE SOCIETY, LTD., a Corporation,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Minutes of Court—December 13, 1923—Order Allowing Writ of Error.

Upon the motion of the Union Assurance Society, Ltd., plaintiff in the above-entitled cause, by Veazie

and Veazie, its attorneys, and upon the filing herein by said plaintiff of its petition, it is ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein and that the amount of bond on said writ of error be and hereby is fixed at Five Hundred Dollars ($500.00); and that upon the giving of such bond all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: This 13th day of December, 1923.

R. S. BEAN,
District Judge.

Filed December 13, 1923. G. H. Marsh, Clerk. [69]

AND AFTERWARDS, to wit, on the 13th day of December, 1923, there was duly filed in said Court a bond on writ of error, in words and figures as follows, to wit: [70]

In the District Court of the United States for the District of Oregon.

No. L.–8953.

UNION ASSURANCE SOCIETY, LTD., a Corporation,

Plaintiff,

vs.

OREGON–WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, That we, the said Union Assurance Society, Ltd., a corporation, organized under the laws of the United Kingdom of Great Britain and Ireland, as principal, and the American Surety Company, a corporation organized under the laws of the State of New York, as surety, are held and firmly bound unto the above-named Oregon-Washington Railroad & Navigation Company, a corporation, in the sum of Five Hundred and no/100 Dollars ($500.00), to be paid to the said Oregon-Washington Railroad & Navigation Company, for the payment of which well and truly to be made we bind ourselves, and each of us, and our and each of our successors, jointly and severally, firmly by these presents.

Signed with our seals and dated this 13th day of December, 1923.

The condition of this obligation is such that whereas the above-named Union Assurance Society, Ltd., has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment rendered and entered in the above-entitled cause by the District Court of the United States for the District of Oregon on the 15th day of June, 1923;

NOW, THEREFORE, if the said Union Assurance Society, Ltd., as such plaintiff in error, shall prosecute said writ to effect and answer all damages and costs if it shall fail to make good its plea, then

this obligation shall be void; but otherwise it shall be and [71] remain in full force and virtue.

IN TESTIMONY WHEREOF, the said principal and surety have caused these presents to be executed by their duly authorized representatives this 13th day of December, 1923.

UNION ASSURANCE SOCIETY, LTD.,
By J. C. VEAZIE,
Its Attorney.

[Seal] AMERICAN SURETY COMPANY.
By W. J. LYONS,
Resident Vice-president.
Attest: W. A. KING,
Resident Ass't Secretary.

The foregoing bond is hereby approved this 13th day of December, 1923.

R. S. BEAN,
Judge.

Filed December 13, 1923. G. H. Marsh, Clerk. [72]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages, numbered from 3 to 72, inclusive, constitute the transcript of record on said writ of error, in the

case in said court in which the Union Assurance Company, Ltd., a corporation, is plaintiff and plaintiff in error, and the Oregon-Washington Railroad & Navigation Company, a corporation, is defendant and defendant in error; and that said transcript is a full, true and correct transcript of the record and proceedings had in said court in said cause as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is Nineteen 75/100 Dollars, and that the same has been paid by the said plaintiff in error.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 21st day of February, 1924.

[Seal] G. H. MARSH,
Clerk. [73]

[Endorsed]: No. 4203. United States Circuit Court of Appeals for the Ninth Circuit. Union Assurance Society, Ltd., a Corporation, Plaintiff in Error, vs. Oregon-Washington Railroad & Navigation Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Oregon.

Filed February 25, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States for the District of Oregon.

January 11, 1923.

L.–8953.

UNION ASSURANCE SOCIETY

vs.

OREGON–WASHINGTON RAILROAD & NAVIGATION COMPANY.

Order Extending Time to and Including February 28, 1924, to File Record and Docket Cause.

Now, at this day, for good cause shown, IT IS ORDERED that the time for filing the transcript of record in this cause and docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby, extended to and including February 28, 1924.

R. S. BEAN,
Judge.

[Endorsed]: No. 4203. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including February 28, 1924, to File Record and Docket Cause. Filed Jan. 28, 1924. F. D. Monckton, Clerk. Refiled Feb. 25, 1924. F. D. Monckton, Clerk.

No. 4203

United States

Circuit Court of Appeals

For the Ninth Circuit

UNION ASSURANCE SOCIETY, LTD.,
a Corporation,
Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Defendant in Error.

APPELLANT'S BRIEF

VEAZIE & VEAZIE,
Attorneys for Plaintiff in Error.
ARTHUR C. SPENCER,
ARTHUR A. MURPHY,
Attorneys for Defendant in Error.

SUBJECT INDEX.

INDEX OF AUTHORITIES.

No. 4203

United States

Circuit Court of Appeals

For the Ninth Circuit

UNION ASSURANCE SOCIETY, LTD.,
a Corporation,
Plaintiff in Error,
vs.
OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Defendant in Error.

APPELLANT'S BRIEF

STATEMENT OF THE CASE.

The plaintiff in error insured the Spokane, Portland & Seattle Railway Company against loss or damage by fire, the policy covering a large amount

of property, including certain freight cars. On September 11, 1921, five of these cars were damaged by fire, the entire loss being $3,728.52. The amount of insurance on each car was $750.00, and under the terms of the policy the plaintiff in error became liable to and did pay the Spokane, Portland & Seattle Railway Company $3056.49. The policy of insurance contained the following provision (Transcript of Record, p. 25):

> "If this company shall clain that the fire was caused by the act or neglect of any person or corporation, private of municipal, this company shall, on payment of the loss be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment."

The plaintiff in error claimed that the fire was caused by the act or neglect of the defendant in error, and therefore, upon making the payment of $3056.49 to the Spokane,Portland & Seattle Railway Company, demanded and received from that company an assignment, termed articles of subrogation, as follows (Transcript, pp. 27, 28):

BE IT KNOWN, That the Union Assurance Society, of London, did insure the Spokane, Portland & Seattle Railway Company, under its Policy No.

65037, issued at its Portland, Oregon, Agency, as follows: $3750.00 on box-cars No. S. P. 3164, 3287, 3187, 3041, 3179, an equal amount on each, for one year, commencing on the first day of March, 1921, and continuing until the 1st day of March, 1922.

FURTHER, That on the 11th day of September, 192-, a fire occurred, by which the property so insured was damaged or destroyed to the amount of Three Thousand Seven Hundred Twenty-eight and 52-100 Dollars, said fire having been caused by sparks from locomotive of the Oregon-Washington Railroad & Navigation Company:

NOW THEREFORE, in consideration of Three Thousand Fifty-six and 49-100 ($3,056.49) Dollars, to us in hand paid by the said Union Assurance Society, of London, in full settlement of our claim against said company, by reason of said loss, damags and policy of insurance 65037, do hereby assign, set over, transfer and subrogate to the said Union Assurance Society, of London, all the right, claim, interest, choses, or things in action, to the extent of Three Thousand Fifty-six and 49-100 ($3,056.49) Dolars paid to us as aforesaid, which we may have against Oregon-Washington Railroad & Navigation Company, or any other party, person, or corporation, who may be liable, or hereafter adjudged liable for the burning or destruction of said property, and hereby authorize and empower the said Union Assurance Society, of London, to

sue, compromise, or settle in our name or otherwise, and it is hereby fully substituted in our place and subrogated to all our rights in the premises to the amount so paid. It being expressly stipulated that any action taken by said company shall be without charge or cost to the Spokane, Portland & Seattle Railway Company.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY,

By ROBT. CROSBIE,
Secretary.

Signed, sealed and delivered in presence of

J. C. McCOMB,
J. M. BALLINGALL.

Dated November 1, 1921.

This action was brought to enforce the right so assigned.

As the errors claimed will require consideration of the pleadings, we believe repetition will be saved by setting out at this point the subtsantial allegations of the amended complaint and the answer. Paragraph I of the amended complaint alleges the corporate status of the parties. The remainder is as follows (Transcript, pp. 6-11):

II.

That on the first day of March, 1921, and thereafter, until and including the 11th day of September, 1921, the Spokane, Portland & Seattle Railway Company, a corporation, was the owner of five freight-cars of the type commonly known as box-cars, and designated respectively by the numbers 3164, 3287, 3187, 3041 and 3179. That on said first day of March, 1921, the plaintiff was, and at all times herein mentioned has been, engaged in the business of insuring against loss or damage to property by fire; and on said first day of March, 1921, the plaintiff executed and issued to the said Spokane, Portland & Seattle Railway Company its policy of insurance numbered 65037, wherein and whereby the plaintiff insured the said Spokane, Portland & Seattle Railway Company for the term of one year, commencing on the first day of March, 1921, and ending on the first day of March, 1922, against loss or damage by fire to the said freight-cars, in the sum of $750.00 on each of the said freight-cars; and said policy of insurance remained and was in full force and effect on the 11th day of September, 1921.

III.

That on the 11th day of September, 1921, the freight-cars aforesaid were standing with other cars on a side-track of the Spokane, Portland & Seattle Railway Company, adjacent to and within about fifteen feet from the main track of said Spokane,

Portland & Seattle Railway Company, near McLaughlin, in the State of Washington; and on said day the defendant, by its servants, agents and employes, ran over said main track and past said freight cars a train composed of cars and an engine or engines belonging to and operated by defendant. That said train was an east-bound freight train of defendant which passed said point at about noon of said day; that plaintiff does not know the number of said train, but defendant is fully informed as to the origin and circumstances of the fire hereinafter mentioned, and knows which of its trains caused the said fire. That defendant was so running its train over the tracks of the Spokane, Portland & Seattle Railway Company, under and by virtue of an agreement between the defendant and said Spokane, Portland & Seattle Railway Company, wherein the said Spokane, Portland & Seattle Company was designated as the Home Company and the defendant was designated as the Foreign Company, and wherein and whereby it was provided and mutually agreed, among other things, as follows:

> The Home Company shall not be held liable for or on account of any loss, damage, or delay, to the trains, engines, cars or other property of any kind of either company, nor to freight, baggage, or other property of any kind carried in or upon such trains, engines or cars, nor for or on account of any injury to or death of passengers or employees of either company, or other persons whomsoever, which may be incurred

or sustained by reason of such trains being detoured, or by reason of such trains being delayed in such detouring, in whatever manner the same may be caused or occasioned, whether by or through negligence of the Home Company, its agents or servants, or by reason of defects in the tracks, structures or facilities furnished by the Home Company, or otherwise, it being understood and agreed that all risk of such delay, loss, damage, injury and death shall be and is hereby assumed by the Foreign Company, and the Foreign Company shall and will hold harmless the Home Company from and against all liability or claims for all such delay, loss, damage, injury and death, and shall and will execute and deliver, or cause to be executed and delivered, to the Home Company, upon request, a full and complete release, satisfaction and discharge of all claims therefor, and will pay, or cause to be paid, all costs, and expenses incurred by either Company in the clearing of the wrecks and repairs of equipment, track and property in which by reason of detour movements covered by this agreement the engines, trains or cars of the Foreign Company are concerned, expenses and atorney's fees incurred in defending any action, which may be brought against the Home Company on account of any such claim or liability and any judgment which may be rendered against the Home Company on acount thereof.

IV.

That at said time, and for about three months prior thereto, the weather was and had been hot and dry, and on said 11th day of September, 1921, the vegetation, structures and combustible objects along and adjacent to the track of the Spokane, Portland & Seattle Railway Company over which the defendant was so operating its train, were dry and inflammable; and said condition was well knawn to defendant.

V.

That nevertheless, defendant carelessly and negligently hauled said train with its engine or engines burning coal, which produced and threw out large quantities of burning particles upon the dry vegetation and other dry and inflammable objects adjacent to said track, and carelessly and negligently failed to equip its said engine or engines with safe, proper or adequate devices for preventing the escape of such burning particles, and carelessly and negligently failed to keep its said engine in such repair and condition as would prevent the throwing out of such burning particles, and carelessly and negligently hauled in said train a large number of cars constituting a load so great that said engine labored heavily and thereby increased the number and size of the burning particles so thrown out, and carelessly and negligently ran the said train at a speed so great that the labor of the engine and the throwing out of burning particles was further in-

creased. That while said train of defendant was so being run, and by reason of such negligence, defendant negligently and carelessly caused its engine attched to said train to throw out burning particles of coal or other substance upon the said freight-cars or the dry vegetation or other dry material adjacent to the said freight-cars, and thereby set the said freight-cars on fire.

VI.

That by the fire so caused and set, said freight-car number 3164 was damaged in the amount of $924.25, and said car numbered 3287 was damaged to the amount of $917.79, and said car numbered 3187 was damaged to the amount of $921.37, and said car numbered 3041 was damaged to the amount of $908.61, and said car numbered 3179 was damagedto the amount of $56.49; making the total of damage upon and to the said five cars $3,728.52. That under and by reason of its policy of insurance aforesaid, the plaintff has paid to said Spokane, Portland & Seattle Railway Company $750.00 each on account of such loss and damage to the cars numbered 3164, 3287, 3187, and 3041, and the sum of $56.49 on account of such loss and damage to car numbered 3179; making the total paid by plaintiff to the Spokane, Portland & Seattle Railway Company on account of such loss and damage, $3,056.49. That such payment was made by plaintiff to the Spokane, Portland & Seattle Railway Company on or about the 18th day of November, 1921.

VII.

That in and by the policy of insurance aforesaid it was, among other things, provided and agreed between plaintiff and the Spokane, Portland & Seattle Railway Company, that if plaintiff should claim that any fire causing loss or damage insured against was caused by the act or neglect of any person or corporation, the plaintiff should, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting from such fire, and that such right of recovery should be assigned to plaintiff by the insured on receiving such payment. That upon payment by plaintiff to the Spokane, Portland & Seattle Railway Company of said sum of $3,056.49 as aforesaid, and in consideration thereof, Spokane, Portland & Seattle Railway Company did assign, set over, transfer and subrogate unto the plaintiff all of its rights, claims and causes of action against the defendant for or on account of the said fire and the loss and damage to the said freight-cars resulting therefrom, to the extend of said sum of $3,-056.49, and plaintiff is still the owner and holder of the rights, claims and causes of action so assigned and transferred.

WHEREFORE, plaintiff prays judgment against defendant for the sum of $3,056.49, and for its costs and disbursments.

The answer is as follows (Transcript, pp. 13-18):

I.

Denies that it has any knowledge or information sufficient to form a belief as to the truth or falsity of the matters set forth in paragraph I of plaintiff's said amended complaint, and defendant therefore denies the same and the whole thereof, except that defendant admits that the defendant is and at all of the times mentioned in plaintiff's amended complaint was a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business at Portland, and that it is and at all of said times was a citizen of the State of Oregon within the meaning of the laws of the United States relating to the jurisdiction of the courts of the United States.

II.

Denies that it has any knowledge or information sufficient to form a belief as to the truth or falsity of the matters set forth in paragraph II of plaintiff's said amanded complaint, and defendant therefore denies the same and the whole thereof.

III.

Denies each and every allegation set forth in paragraph III of plaintiff's amended complaint and the whole thereof, except that defendant admits that on the 11th day of September, 1921, the Spo-

kane, Portland & Seattle Railway Company, a corporation, owned a railroad right of way at and near McLaughlin, in the State of Washington, together with a main track located on said right of way, and that said Spokane, Portland & Seattle Railway Company was at said time operating a railroad over said right of way and track, and that on said 11th day of September, 1921, a certain eastbound freight train belonging to defendant was run and operated over and along said right of way and track of said Spokane, Portland & Seattle Railway Company passing McLoughlin, Washington, at about noon of said day, with certain engines numbered 2113 and 2128, the property of the defendant, operated, directed and controlled by a pilot engineer furnished by said Spokane, Portland & Seattle Railway Company, subject to the rules and regulations of said company and to the orders of the train-dispatcher of said company. And said defendant further admits that said train was run and operated over said track of the Spokane, Portland & Seattle Railway Company under and by virtue of an agreement between the defendant and said Spokane, Portland & Seattle Railway Company, wherein the said Spokane, Portland & Seattle Railway Company was designated as the Home Company and the defendant was designated as the Foreign Company, and wherein and whereby it was provided and mutually agreed, among other things, as is set forth by plaintiff on page 3, lines 5 to 20, inclusive, of its amended complaint.

IV.

Admits the allegations of paragraph IV of plaintiff's said amended complaint, except that defendant denies that it had any knowledge of the condition on said 11th day of September, 1921, of the property of said Spokane, Portland & Seattle Railway Company, or of the vegetation, structures or objects thereon, save only as such property, vegetation, structures and objects may have been observed by its employees during the movement of the trains of defendant over the tracks of said Spokane, Portland & Seattle Railway Company, and defendant particularly denies any knowledge which required the defendant to exercise greater care and precaution than was exercised by said defendant in the movement of its trains over the tracks of the Spokane, Portland & Seattle Railway Company.

V.

Denies each and every allegation, averment and thing set forth and contained in paragraphs V. VI and VII of plaintiff's said amended complaint, and each and every part and the whole thereof.

And for further and separate answer and defense to plaintiff's amended complaint, defendant alleges:

I.

That on the 11th day of September, 1921, the defendant owned a certain freight train known and

designated as Extra East No. 2113, propelled by locomotives Nos. 2113 and 2128, which was run in an easterly direction over and along the tracks of the Spokane, Portland & Seattle Railway Company passing McLaughlin in the State of Washington, at about noon of said day; that said freight train was the only freight train belonging to this defendant which was run in the vicinity of McLaughlin, Washington, in an easterly direction for a period of several hours prior to noon on said 11th day of September, 1921; that said freight train was operated by a pilot engineer of the Spokane, Portland & Seattle Railway Company with the assistance of engine crews and train crews of this defendant, and subject to the orders of the train-dispatcher of said Spokane, Portland & Seattle Railway Company, and to the rules and regulations of said company; that on said 11th day of September, 1921, and immediately prior thereto said locomotives numbered 2113 and 2128 were of first-class construction and repair and were equipped with suitable and proper spark-arresting devices, and said spark-arresting devices were at said time and place in proper position and in good condition and repair, and said locomotives were and each of them was furnished and supplied by this defendant with fuel of first-class quality and grade, and said locomotives were properly operated and maintained by competent employees, and were not overloaded, nor working up to their capacity, and everything was done in the construction, maintenance and operation of said locomotives to make them safe and secure against the escape of fire

therefrom, and this defendant alleges that the fire complained of by plaintiff was not ignited or set by any of its officers, agents or employees, or by locomotive No. 2113 or locomotive No. 2128, or by any other locomotive of defendant operated over the line of railroad of the Spokane, Portland & Seattle Railway Company, or otherwise, and defendant alleges that said alleged fire complained of by plaintiff was not caused by or through any act, fault, negligence or want of care on the part of this defendant or any of its agents, servants or employees. That the circumstances herein referred to are the same circumstances mentioned in plaintiff's amended complaint.

WHEREFORE, defendant having fully answered plaintiff's amended complaint herein, prays that this action be dismissed and that plaintiff take nothing thereby, and that defendant do have and recover its costs and disbursements herein.

Two points are involved in this appeal, as follows:

First: The plaintiff in error offered in evidence a certain bill rendered by the Spokane, Portland & Seattle Company to the defendant in error, which appears at length on pages 30, 31 and 32 of the transcript, with proof of payment thereof. This bill described particularly the cars referred to in the complaint, gave their respective values and the damage to each which was caused by the fire of

September 11th, 1921, on which this action is based, such damage aggregating $3728.52, and showed a balance of $672.03, over and above the sum of $3,-056.49 covered by insurance. Plaintiff in error offered to prove that this bill, representing the balance of loss on the same cars and by the same fire, was paid by defendant in error upon presentation, whereby it admitted the fact, nature and extent of its liability. This offer resulted in extended argument, as appears from the bill of exceptions (Transcript, pp. 33-54). In the course of that argument, it was contendedbytheattorney for the defendant in error that the payment of the bill was not competent as an admission of liability, because the payment was made by reason of the contractual liability created by the agreement set out in paragraph III of the amended complaint, and therefore did not imply an admission of negligence. The following summarizes his position (Transcript, p. 40):

> COURT: Your position, Mr. Murphy, I understand is you made this payment by reason of your contract, and under your contract and not because of any admission of any negligence on your part.
>
> MR. MURPHY: That is my point.

The court rejected the evidence offered, holding that the payment was made in recognition of a contractual liability, and therefore was not an admission of negligence, and holding further that the cause of action set up in the complaint was based

on negligence (Transcript, pp. 51, 52). The attorney for defendant in error protested that the complaint contained, in addition to the allegations of negligence, a complete statement of all facts necessary to constitute a cause of action based upon this contractual liability and the assignment thereof, and that in the absence of any motion requiring an election, it was entitled to recover on either ground (Transcript, pp. 52, 54). The court adhered to its ruling, holding that the complaint must be construed as an action for negligence; and an exception was taken (Transcript, p. 54).

Second: Plaintiff in error requested an instruction, which apears at length in the specifications of error, to the effect that under the detour agreement set out in paragraph III of the complaint, and the assignment to it by the Spokane, Portland & Seattle Railway Company, plaintiff in error was entitled to recover without proof of negligence. This instruction was refused, and an exception taken.

SPECIFICATION OF ERRORS

Plaintiff in error claims that in the trial of this cause the following errors occurred, which are hereby specified and relied upon, to-wit:

I.

That the United States District Court for the District of Oregon erred in excluding from evidence

and from consideration by the jury, and in refusing to admit in evidence in said cause that certain written instrument offered in evidence by the plaintiff and hereinafter set forth, together with the voucher-check thereto attached, being a voucher-check of the defendant in favor of the Spokane, Portland & Seattle Railway Company for the sum of $672.03 which was marked "paid and cancelled", said instrument being a bill of the Spokane, Portland & Seattle Railway Company against the defendant and being receipted so as to show payment by the defendant on or about the 7th day of February, 1922, and said instrument or bill being in words and figures, as follows:

Portland, Ore., Nov. 15, 1921.

Oregon-Washington R. R. & Navigation Co.,
F. W. Sercombe, Auditor,
Portland, Oregon.

To Spokane, Portland & Seattle Railway Company, Dr.

Remit to Chas. C. Rose, Treasurer, Portland, Ore.
Department Memo. No. 22882.

For value of SP&S Cars 3287, 3187, 3164 and 3041, which were destroyed, and cost of repairs to SP&S Car 3179, which was damaged by fire September 11, 1921, at McLaughlin, Washington, due to sparks from your coal burning engine passing over our line under detour arrangements.

SP&S 3041, 40-ft. box car, 80,000 capacity, of wood construction, built October, 1910.		
Weight, 35,100 lbs.		
Reproduction value at .0512 per lb.	$1797.12	
Less depreciation 10 yrs. 11 mo. at 4% per annum	784.74	
Depreciated value	1012.38	
Less net value of salvage recovered	103.77	
Net loss	$ 908.61	
Less amount recovered from insurance	750.00	
		$158.61
SP&S 3164, 40-ft. box-car, 80,000 capacity, of wood construction, Built October, 1910, weight 35,800 lbs.		
Reproduction value at .0512 per lb.	1832.96	
Less depreciation 10 yrs., 11 mo., at 4% per annum	800.39	
Depreciated value	1032.57	
Less value of net salvage recovered	108.32	
Net loss	924.25	

Less amount recovered from insurance	750.00	
		$174.25
SP&S 3187, 40-ft. box-car, 80,000 capacity, of wood construction, built October, 1910. Weight 35,400 lbs.		
Reproduction value at .0512 per lb.	1812.48	
Less depreciation 10 yrs., 11 mo., at 4% per annum	791.45	
Depreciated value	1021.03	
Less net value of salvage recovered	99.65	
Net loss	$ 921.38	
Less amount recovered from insurance	750.00	
		$171.38
SP&S 3287, 40-ft. box car, 80,000 capacity, of wood construction. Built October, 1910. Weight 35,000 lbs.		
Reproduction value at .0512 per lb.	1817.60	
Less depreciation 10 yrs. 11 mo. at 4% per annum	793.67	
Depreciated value	1023.93	

Less net value of salvage recovered	106.14	
Net lass	917.79	
Less amount recovered from insurance	750.00	
		$167.79
		$672.03
SP&S 3179, Net cost of repairs per Vancouver Shop Order No. 2609,	56.49	
Less amount recovered from insurance	56.49	
		No charge.

Amount of this bill is $672.03.

II.

That the said Court erred in refusing to give to the jury the instruction requested in writing by plaintiff and being by it numbered 4 and which was in words as follows, to-wit:

> "It is admitted by the pleadings that the dedefendant was operating this train over the tracks of the Spokane, Portland & Seattle Railway Company under a written agreement, which contained certain provisions alleged in the complaint and admitted by the answer. I instruct you that under those provisions, the defendant assumed liability to the Spokane, Portland & Seattle Railway Company for any damages

which might be done to the property of Spokane, Portland & Seattle Railway Company through the operation over its tracks of the defendant's trains; and the plaintiff as assignee of the Spokane, Portland & Seattle Railway Company, is therefore entitled to your verdict, if you find that defendant's locomotive set this fire, even though you may believe that defendant was not negligent."

III.

That the Court erred in rendering judgment in the said cause in favor of the defendant and against the plaintiff.

ARGUMENT.

The first question to be considered is whether, under the pleadings, plaintiff in error can recover without proving negligence. This involves a construction of the amended complaint, and a construction of the so-called detour agreement.

The complaint alleges (Par. II) that the Spokane, Portland & Seattle Railway Company owned certain cars, which plaintiff had insured. In paragraph III, it is alleged that on September 11, 1921, these cars were standing on a certain side-track of the Spokane, Portland & Seattle Railway Company, adjacent to its main track, and that defendant ran over said main track a freight train, which it was operating under a detour agreement with the Spo-

kane Company, containing certain terms, quoted in paragraph III. We claim, and for the present will assume, that these provisions cast upon the defendant liability for any damage caused by it in the course of such detouring, no matter whether it was or was not negligent. So far, the allegations of the complaint are entirely consistent with a claim of contractual liability to the Spokane company, and an assignment thereof to plaintiff. In fact, we fail to see how the reference to the detour agreement can be contrued otherwise than as evidence of an intention to rely on the liability which it created. Otherwise, it would seem to be superfluous.

Paragraph IV relates to the weather and the condition of the vegetation; and it is conceded that this paragraph might have been dispensed with if plaintiff had intended to rely wholly on the detour agreement.

Paragraph V contains various allegations of negligence, which would be superfluous if contractual liability only had been relied upon. However, it contains also the distinct allegation that while the train of defendant was so being run, the locomotive threw out sparks, and thereby set these freight cars on fire.

Paragraph VI alleges the damage done to the various cars, and the payments which plaintiff made to the Spokane company, under its insurance policy.

Paragraph VII sets out the provisions of the

policy relative to subrogation, and the assignment to the plaintiff of the claims of the Spokane company against defendant growing out of this fire.

We believe it is manifest that the complaint states a complete cause of action, based upon the contractual liability of defendant to the Spokane company under the detour agreement, and an assignment thereof to plaintiff. It is alleged that these cars were insured by plaintiff to the amount of $750.00 each; that defendant set them on fire, thereby damaging four of them in excess of $750.00 each, and a fifth to the amount of $56.49; that plaintiff was bound to and did pay the Spokane company $3056.49 under its policy; that the train of defendant which set the fire was being operated under a detour agreement which made defendant liable to the Spokane company; that by the terms of the insurance policy, if the plaintiff claimed the loss was caused by the act or neglect of defendant or any other person, the Spokane company was bound to assign to plaintiff its right of recovery against defendant or such other person; and that such assignment has been made.

In the argument before the District Court, some question was raised whether such liability based on the detour agreement could be or was assigned. However, this point seems too clear to require citation of authorities or extended argument. Entirely aside from the policy provisions, the claim, being one for damage to property, was assignable. It might have been assigned to John Doe or Richard

Roe or any other stranger to the transaction. It was assigned to this plaintiff in error. However, the assignment was clearly within the express terms, as well as the intent, of the policy provision. The policy says the insurer shall be entitled to subrogation if it claims that the loss was due to the **act or neglect** of another. The clear intent of that provision is that the insurer shall have the benefit of any right of recovery which the assured may have against others.

Having stated a complete cause of action growing out of the mere setting of the fire, are we barred from recovery thereon because we have also alleged that the fire was set negligently? The question appears to be one of Oregon law and practice.

In **Harvey vs. Southern Pacific Company,** 46 Ore., 505, the action was for damages for the killing of an animal by defendant's train. In the opinion, written by Chief Justice Wolverton, it is said on pages 509-511:

> 1. The first question presented for our determination is one of practice, and arises upon the trial court's allowance of the motion requiring the plaintiff to elect as to which cause of action he would proceed upon at the trial. The complaint, we think, may appropriately be characterized as containing a duplicate statement of distinct grounds of recovery for the same right of action; the right arising from the single transaction in killing plaintiff's animal. The defendant is charged, however, with two

culpatory acts in the invasion of plaintiff's right —one for the common-law negligence, and the other for failure to fence, a duty imposed upon it by statute—for either one of which plaintiff is accorded a right of action but the relief is different. Upon the ground first named, the measure of relief is the value of the animal lost, but upon the other is the value of the animal, enhanced by reasonable attorney's fees for the prosecution of the action (Section 5146, B. & C. Comp.), so that there are stated in the complaint two grounds of recovery for the same right; affording the plaintiff different reliefs, according to the cause maintained. He could not have two judgments, however, and a judgment in the one form would preclude a judgment in the other, as the law does not allow double damages for the invasion of the same right. For joining the two grounds or causes of action in the same count, the defendant had its motion before answer to strike out the complaint because they were not separately stated; (B. & C. Comp., Sec. 81). By pleading over the right to interpose such a motion was waived.

2. There is, however, another exigency to which this motion does not extend. If there be duplicate statements of the same cause of action, or statements of different grounds of recovery for the same right, the defendant is entitled. unless in exceptional cases, to have the plaintiff elect upon which ground or cause he will proceed to trial, and the motion directed to that purpose may be interposed at any time before the trial. Mr. Pomeroy states the rule as follows: "Since the reformed pleading requires the facts to be

averred as they actually took place, it does not, in general, permit a single cause of action to be set forth in two or more different forms or counts, as was the familiar practice at the common law. The rule is undoubtedly settled that, under all ordinary circumstances, the plaintiff who has but one cause of action will not be suffered to spread it upon the record in differing shapes and modes, as though he possessed two or more distinct demands; and, when he does so without special and sufficient reason, he will be compelled, either by a motion before the trial, or by an application and direction at the trial, to select one of these counts, and to abandon the others": Pomeroy, Code Rem. (4 ed.), Sections 467, *576. Mr. Phillips says: "It may safely be said that the true rule, resting upon principle and supported by the weight of authority, now is that where a plaintiff has a single right of recovery that may rest upon one ground or upon another, according to the facts to be shown by the evidence, and he cannot safely foretell the precise nature and limits of the defendant's liability to be developed upon the trial, he may state his right of action variously, in separate causes of action. This privilege is an exception to the general rule that each separate statement should set out a distinct and independent right of action, and, inasmuch as a plurality of statements multiplying the issues and tends to obscure the real claim which the defendant will have to meet it is to be indulged only where it is fairly necessary for the protection of the plaintiff, and where it will not mislead or embarrass the defendant in his defense": Phillips, Code Plead. Sec. 207. See, also, Spaulding vs.

Saltiel, 18 Colo. 86 (31 Pac. 486); Cramer vs. Oppenstein, 16 Colo. 504 (27 Pac. 716); Brown vs. Kansas City, etc. Ry. Co., 20 Mo. App. 429; Otis vs. Mechanics' Bank, 35 Mo., 128; Cartin vs. South Bound R. C. 43 S. C. 221 (20 S. E. 979, 49 Am. St. Rep. 829).

It was held that plaintiff was properly required to elect one or the other ground of recovery. As appears from paragraph IV, on page 512, this decision was based on two grounds: first, that the relief was different under the two theories; and second, that the nature of the liability was clear, so that plaintiff's rights were not in doubt. It is said (p. 512):

> 4. There should not be a confusion of the right of action. Different rights of action should always be separately stated when they can be nited in the same complaint. Different grounds of action for the same right give rise to different causes, which may or may not be united, according to the rule denoted by the above authorities. In the present case, as we have seen, different grounds are assigned in the same count. The right of action is esentially the same, but the relief is different. For this latter reason the trial and the adjustment of a verdict would be attended with more or less confusion, and, the grounds being such in either alternative that the plaintiff must have known the precise nature and limits of the defendant's liability, we are of the opinion that the trial court's discretion in the premises was legally and properly exercised.

In **Hoag vs. Washington-Oregon Corporation,** 75 Or., 588, the action was for personal injuries, and the complaint contained allegations showing liability for negligence at common law, and also under the Employers' Liability Law of Oregon. In the opinion on rehearing in banc, concurred in as to this point by all of the justices, it is said, on pages 601-603:

> 7. Beyond question the complaint states facts sufficient to justify a recovery either under the common law or under the statute, but it states only one cause of action.
>
> 8. In common with all the Code states, our statute (Section 67, L. O. L.) requires a complaint shall contain "a plain and concise statement of the facts constituting the cause of action." A "cause of action" comprehends two elements: (1) A legal right on the part of the plaintiff; and (2) a breash of a corresponding duty on the part of the defendant to accord that right: Pomeroy's Rem., Sec. 452; Words and Phrases, tit. "Cause of Action." From this definition it follows, necessarily, that all breaches of legal duty arising out of one transaction, whether flowing from common law or from the statute constitute but one cause of action, unless the statutory remedy is so inconsistent with the common-law remedy that the same judgment could not be rendered upon recovery. In such instances the plaintiff may be required to elect upon which cause of action he will proceed. Thus in Harvey vs. Southern Pac. Co., 46 Or. 505 (80 Pac. 1061), the plaintiff brought an action for the killing of stock upon a railroad track,

and in his complaint set up in a single count facts showing a right of recovery at common law, where the measure of damages is the value of the animals injured, and a right of recovery under the statute which gave, under certain circumstances, triple damages for a like injury. It was held that he might have been required to elect upon which cause he would proceed, but that, the defendant having failed to move for the court to compel such election on the trial, he could not afterward raise the objection. The reason for this holding is apparent, because, if a jury should return a general verdict, the court would be unable to determine whether to assess triple damages or to enter judgment for the amount found in the aerdict.

9. But in the case at bar the measure of damages is the same in either case; the difference between the common-law liability and that arising under the statute being that additional duties on the part of the employer to the employee are added by the statute to those existing at common law. The whole obligation of the employer to the employee is the sum of all the duties imposed by law, whether common law or statute, and the rights of the employee to redress for a breach of these duties arises from the law, considered as a whole, irrespective of its source. The case presented by the pleadings involved a double aspect charging matters upon which a recovery might have been had either at common law or under the Employers' Liability Act, and the defendant, without demurring, moving to make more definite and certain, or to elect, promptly answered, denying all allegations of

> negligence and pleading assumption of risk and contributory negligence. The testimony went in with few objections on either side, and it was only when requests for instructions were refused or when objections to instructions given were excepted to that the question as to the double aspect of the case was raised. After a careful examination of the authorities, including Schulte vs. Pacific Paper Co., 67 Or. 334 (135 Pac. 527, 136 Pac. 5), and our former opinion in the case at bar, we have arrived at the conclusion that, under the pleadings and evidence in this case, it was not error for the court to instruct both as to the liability of the defendant at common law and under the statute, and to say to the jury that, if the acts showed a liability or lack of liability, as tested by the whole law on the subject, they should render a verdict consonant with the law considered as a whole; and, further, that if facts showed a breach of the employers' liability statute, the defenses of contributory negligence and assumption of risk should be eliminated.

These decisions seem conclusive. Under them, it is clear that plaintiff in this case has stated but one cause of action, namely, one acruing to the Spokane company by destruction of these cars and assigned to plaintiff. The measure of recovery was precisely the same on either theory, namely, the loss inflicted by defendant's act.

It is unnecessary to speculate whether the complaint might have been stricken upon timely motion on the ground that it stated two causes of action, or whether plaintiff might have been required to

elect between its allegations of negligence and its allegations of liability byreason of the detour agreement. No such motion was presented, nor did the court of its own motion require an election. It simply held that the allegations respecting the detour agreement must be ignored, or treated as matters of inducement or explanation.

Those allegations were not so intended, nor can they on any reasonable theory be so treated.

If plaintiff was to be required to elect, it should have been allowed to make the election for itself. It should not have been deprived summarily, and for reasons not even indicated in the objection or arguments of oposing counsel, of a ground of recovery pleaded adequately and not attacked by any appropriate motion.

THE DETOUR AGREEMENT.

The question whether the detour agreement did in fact impose upon defendant in error liability for the destruction of these cars, regardless of negligence, appears to have been settled for the purposes of this case by the position taken by counsel. It is true, that a strong effort was made to claim an advantage without incurring the appropriate penalties; but that effort was hardly successful. It is difficult to eat ones cake and still retain it for another meal. The sum and substance of counsel's objection to the bill offered and excluded was, that the detour agreement cast upon defendant in error

a liability additional to and different from that otherwise existing. He argued that payment of this bill did not imply an admission of negligence, because under the detour agreement the defendant in error was liable without negligence. The court took him at his word, and excluded the evidence.

The point made or the ruling thereon cannot be justified upon any other theory. In any case of this kind, where payment of one claim arising out of a given transaction is offered as an admission of liability in connection with another claim, it is doubtless open to the opposing party to explain that the payment was made gratuitously, or for some other reason not applicable to the case on trial. However, this is defensive matter, and does not and can not affect the admissibility of the evidence in the first instance. It was therefore no legitimite objection to the evidence offered in this case for counsel to say that the bill might have been paid gratuitously, or in recognition of a moral obligation, or for the sake of preserving good relations between the awo railroad companies. The admissibility of the evidence had to be tested according to the facts then before the court. If the detour agreement did in fact cast upon the defendant in error a liability independent of negligence, then the point was a legitimate one; but if it did not create such liability, then the point made was obviously without merit, and the argument in support of it was meaningless, and the decision cannot be explained or defended. We believe, therefore, that counsel for defendant

in error must be deemed to have admitted, and the trial court must be deemed to have held, that the detour agreement did make the defendant in error liable for the destruction of these cars without regard to negligence, and that for the purposes of this case, the point must be regarded as settled.

However, if it is deemed open to argument, we believe the construction of this detour agreement is clear.

As stated in the argument at the trial, this agreement is closely knit, and each word has a meaning. It provides that

> The Home Company shall not be held liable for or on account of any loss, damage, or delay of the trains, engines, cars or other property of any kind of either company.

As in any event the home company could not be liable in the ordinary sense for injury to its own property, the full meaning of this expression must be sought further on. A little later, and in the same sentence, and in the same connection, the agreement goes on to say,

> It being understood and agreed that all risk of such delay, loss, damage, injury and death shall be and is hereby assumed by the foreign company.

In using this language, the agreement refers, among other things, to risk of damage to property of the Spokane, Portland & Seattle Railway Company which is described in the agreement as the Home Company. This expression, as applied to

damage to property of the home company, can mean only that the defendant in error as the foreign company shall be liable for or shall make good any loss which the home company may suffer to its own property through the detour movements of the foreign company. To hold otherwise would be to deprive the language of any meaning whatever.

> Further on in the same sentence, and in the same connection, it is provided that the foreign company will pay or cause to be paid all costs and expenses incurred by either company in the clearing of wrecks and repairs of equipment, track and property, in which, by reason of detour movements covered by this agreement, the engines, trains or cars of the foreign company are concerned.

The obvious meaning of this language is, that the defendant in error as the foreign company will make or pay for all repairs to the property of the home company which may be made necessary by any act of the foreign company in connection with the detour movements. It was admitted by counsel upon the argument that within the meaning of this provision the defendant in error as the foreign company would have been required, regardless of negligence, to pay for the repairs of these identical cars if they had been repaired. The record shows that one of the cars was damaged only to a comparatively slight extent, and that it was subject to repair, and doubtless was repaired; and it shows further that there was a substantial salvage of metal parts of all the cars involved, so that their restoration

might in a sense be deemed a repair. However this may be, it would be strange to construe the agreement in such a way that the defendant in error as the foreign company would be required to pay for repairs an a car damaged to the extent of say one-third or two-thirds of its value, but would not be required to pay for a car destroyed entirely.

We therefore believe that the reasonable construction of this detour agreement requires that the agreement be hald to impose upon the defendant in error liability for damage caused by it in the course of the detour movements to the property of the home company. The parties to the agreement have so construed it in their transactions, and the defendant in error has claimed that construction at a point in the trial of this case where it appeared advantageous.

Aside from this primary question of liability, the bill offered and rejected was admissible for other and minor purposes. The question of negligence was not the only one involved in the case. The setting of the fire by the defendant in error and the amount of damage caused thereby were put in isssue. Even if the rendition and payment of the bill did not amount to a complete admission of liability, nevertheless they did imply an admission that defendant set the fire, and thereby caused damage to a stated extent. Exclusion of the bill and the accompanying evidence was therefore error, even if the detour agreement were to be construed as creating no liability in the absence of negligence.

ADMISSIBILITY OF THE REJECTED BILL AND EVIDENCE OF ITS PAYMENT.

It is well settled, that payment to one person of a claim arising out of a given injury, may be proved as an admission of liability in an action by another person growing out of the same injury.

In the case of **Weiss vs. Kohlhagen,** 58 Ore., 144, the plaintiff was the lessee of a certain building, and had therein a stock of merchandise. Defendant in the course of excavating on adjoining premises, caused this building to fall, whereby damage was done to plaintiff's property. Plaintiff offered to prove that defendant had settled with Marsters, the owner of the building. It is said, on page 153:

> George Kohlhagen, defendant, as a witness in his own behalf, upon cross-examination, was asked:
>
> "Now is it not a fact, Mr. Kohlhagen, that after the Marsters biulding fell down that you paid Mr. Marsters for his building and damages?"
>
> This was objected to by defendant's counsel, the objection sustained and exception duly saved. It may be shown that the party claimed to be liable has settled with others in the same position as plaintiff; Howland vs. Bartlett, 86 Ga. 669 (12 S. E. 1068); Campbell vs. Missouri Pacific R. Co. 86 Mo. App. 67; Grimes vs. Keene, 62 N. H. 330; 16 Cyc. 594, and note.

The court comments upon the fact that the

answer expected was not disclosed, and it did not appear whether the settlement was a compromise. In the present case, the offer of evidence disclosed all of the facts, and it was obvious on its face that there was no compromise, as the bill submitted was paid as rendered, and covered the entire amount of the damage incurred.

The rule is laid down as follows in 22 C. J., page 320, Section 354:

> It may be shown as an implied admission that the party claimed to be subject to a certain liability has paid the claims of others who were in the same position as the claimant; but a compromise between a party and a third person cannot be shown, even though it relates to the same matters involved in the action, and the person with whom the compromise was made was in the same position as the party seeking to show such compromise, except under unusual circumstances. A settlement by an injured person with an accident insurance company in which he carried a policy is not admissible in an action by him against the person whose alleged negligence caused the injury.

The subject is also discussed at length, and the same conclusion is announced, in the case of **Michigan Mutual Home Insurance Company vs. Pere Marquette Railway Company,** 193 Mich., 429..

On the face of the transaction, the rendition and payment of this bill amounted to an admission of full liability. If there was anything in the nature

of a gratuitous payment or compromise, defendant in error was undoubtedly entitled to show that fact, but nevertheless the evidence was admissible in the first instance.

The question raised by the second specification of error, relating to an instruction requested by plaintiff in error and refused by the court, does not apear to require separate discussion, as the point involved is substantially the same as the ones already argued. Apparently this instruction was refused because the court had ruled that under our complaint we could not recover otherwise than upon proof of negligence. If that ruling was erroneous, and if the detour agreement by its terms or according to the construction put upon it by the defendant in error for the purpose of this case did impose upon the defendant in error liability for destruction of these cars without regard to negligence, we were entitled to this instruction. Otherwise we were not. All of these questions have been discussed in connection with the first specification of error.

For the reasons stated, we respectfully ask that the judgment of the District Court be reversed.

Respectfully submitted,

VEAZIE & VEAZIE,

J. C. VEAZIE,

Attorneys for Plaintiff in Error.

No. 4203

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNION ASSURANCE SOCIETY, LTD.,
a Corporation,
Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the District Court of the United States for the District of Oregon

VEAZIE & VEAZIE,
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HOUGHTON-CARSON COMPANY, PRINTERS

SUBJECT INDEX

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STATEMENT OF THE CASE

This case involves three alleged errors claimed to have been committed by the District Court in the trial, with the intervention of a jury, of an action at law based on negligence claimed to have been committed by the defendant in error. From a judgment of the District Court, based on the verdict of the jury in favor of the defendant in error, this proceeding is prosecuted.

Plaintiff in error, as assignee of the Spokane, Portland & Seattle Railway Company, sought to recover

from the defendant in error the amount of a payment made to the Spokane, Portland & Seattle Railway Company under a policy of insurance for loss of and damage to five freight cars by fire. Defendant in error denied that the fire complained of by plaintiff in error was caused by or through any act, fault, negligence or want of care on the part of the defendant in error, or any of its agents, servants or employes, and introduced evidence tending to establish these facts. Counsel for plaintiff in error claim, but the defendant in error denies, that the amended complaint upon which the action was tried alleges a cause of action, in favor of the plaintiff in error as assignee, on the contract under which the trains of the defendant in error were operated upon the property of the Spokane, Portland & Seattle Railway Company. Paragraph VII of the complaint, included by plaintiff in error in its statement of the case, does not allege that the plaintiff in error made any claim at or prior to the time it paid the loss to the insured that any fire causing loss or damage insured against was caused by the act or neglect of the defendant in error, or any person. Neither is this elsewhere alleged in the complaint, nor does evidence of the making of such a claim appear in the record. That portion of the statement of the case made by plaintiff in error in the third paragraph on page 4 of appellant's brief, reciting the making of a claim in accordance with the requirements of its policy of insurance, is therefore controverted. The plaintiff in error introduced testimony tending to show that under its policy of insurance it demanded the execution of an assignment by the

Spokane, Portland & Seattle Railway Company and received an assignment from that company.

During the trial plaintiff in error demanded that the defendant in error produce a bill rendered against the defendant in error by the Spokane, Portland & Seattle Railway Company in the sum of $672.03, and a canceled voucher check of the defendant in error in favor of the Spokane, Portland & Seattle Railway Company in the same amount. Upon production of these documents they were offered in evidence by plaintiff in error as an admission of liability. Objection was made by defendant in error to the admissibility of these documents and the objection was sustained. The objection made embraced these points:

> 1st. That by virtue of the contract between the defendant and the Spokane, Portland & Seattle Railway Company, referred to in the complaint, pursuant to which the payment was made, the defendant did not bear the same relationship to the Spokane, Portland & Seattle Railway Company as it did to the plaintiff claiming under its assignment. That payment under the circumstances was not an admission of liability as the Spokane, Portland & Seattle Railway Company was not on a parity with the insurance company. (Trans. p. 37.)
>
> 2nd. That the bill and voucher indicated a compromise settlement. (Trans. p. 38.)
>
> 3rd. That the rights of the Spokane, Portland & Seattle Railway Company under its detour con-

tract were not such as would pass to the plaintiff in error under its assignment. (Trans. p. 48.)

4th. That the transactions between the defendant in error and the Spokane, Portland & Seattle Railway Company under the detour contract were not within the issues of the case because of the terms of the insurance policy and the pleadings. (Trans. pp. 49, 50.)

The trial court sustained the objection on the ground that the Spokane, Portland & Seattle Railway Company and the insurance company did not occupy the same relationship or the same position to the defendant (Trans. p. 51); that the cause of action was for negligence (Trans. pp. 52, 54); that under the pleadings the plaintiff could not recover by reason of the detour agreement between the Spokane, Portland & Seattle Railway Company and the defendant. (Trans. p. 52.)

THE NATURE OF THE ACTION

The first proposition claimed by the plaintiff in error is that the complaint states two causes of action which although admittedly improperly joined, and not separately stated, will each support a judgment in the absence of a direct attack by the defendant thereon for misjoinder. One of these causes of action is admittedly an alleged tort for damage to property and the other is claimed to be an action on contract for damage sustained by the assignee thereof. Since the verdict of the jury in favor of the defendant operates as a conclusive

finding that the defendant in error was not guilty of negligence in any of the particulars charged in the complaint, counsel for plaintiff in error themselves urge the duplicity of the amended complaint in an effort to avoid the legal effect of this finding. Since subrogation is founded on equitable principles, it can seriously be questioned whether such a course can be justified even if such action were permitted under the rules of pleading and practice.

Section 94, Olson's Oregon Laws is as follows:

"Joinder of Causes of Action. The plaintiff may unite several causes of action in the same complaint when they all arise out of—

1. Contract express or implied; or,
2. Injuries, with or without force, to the person; or,
3. Injuries, with or without force, to property; or,
4. Injuries to character; or,
5. Claims to recover real property, with or without damages, for the withholding thereof; or,
6. Claims to recover personal property, with or without damages, for the withholding thereof; or,
7. Claims against a trustee, by virtue of a contract, or by operation of law.

> But the causes of action so united must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated."

In this connection it will be noticed that the Oregon statute is different from those of many states in that it does not provide for the joinder of causes of action which arise out of the same transaction.

It should also be borne in mind that the amended complaint was filed by the plaintiff in error subsequent to the order of the trial court on a motion of defendant in error directed against plaintiff's complaint, as a part of which motion the defendant moved to have stricken from the complaint, for incompetency, irrelevancy and immateriality, that portion of paragraph III of the complaint setting forth some of the provisions of the detour contract. This part of the motion was denied by the court on the theory that while the complaint was for damage to property caused by negligence, the averment was material and proper to show the circumstances under which it was claimed that the Spokane, Portland and Seattle Railway Company's property was being used by the defendant. Plaintiff in error thereupon reincorporated in its amended complaint (Trans. pp. 7 and 8) the provisions of the detour contract against which the motion had been filed. In following this course the plaintiff in error adopted the construction urged in opposition to the motion to strike and relied upon by the court in overruling the motion, and should not be heard to say that the averments were inserted

for another secret purpose after the trial commenced, and when counsel for plaintiff in error refused to recognize the right of the defendant to move for an election (Trans. p. 53).

This situation first confronted the court when during a discussion of the admissibility of certain testimony, offered by the plaintiff, its counsel (in part) said:

> "It seems to me clear that under that detour agreement the Oregon-Washington Railroad & Navigation Company is bound to the Spokane, Portland & Seattle Railroad Company and therefore to us as the assignee of the Spokane, Portland & Seattle Company for its damage, regardless of the question of negligence." (Trans. p. 46.)

whereupon the court (in part) said:

> "This case, however, as I understand the record and pleadings, is based upon the charge of negligence. It is charged in the complaint that through the negligence and carelessness of the defendant company this property was destroyed, and that by reason of that fact the insurance company was compelled to and did pay a certain sum of money to the assured, and it is that sum it is seeking to recover in this action, and under this complaint it seems to me quite clear the action must proceed on the charge of negligence and not by reason of any agreement or understanding between the two companies concerning the occupation of this line." (Trans. p. 52.)

This conclusion was excepted to by counsel for plaintiff in error who thereupon reiterated his opinion that the amended complaint had a double aspect in that

> "we have set up a cause of action which would be complete in itself regardless of the negligence; we have set up also a cause of action on the negligence." (Trans. p. 54.)

Counsel for plaintiff in error then declared this to be the plaintiff's theory from the beginning and at the time of the argument of the motion to strike.

In overruling this contention, the court said:

> "I looked at the record and everything that was filed at the time that motion was disposed of and it was overruled on the theory that this allegation explains the reason why the Oregon-Washington Railroad & Navigation Company was using that line at that time, but I am unable to construe this complaint in any way other than an action for negligence, because if it had been brought on the assignment claim it would simply have been alleged in straight language that the defendant company by reason of the contract incurred liability, and that that liability had been assigned to the Insurance Company and the question of negligence would not have been alleged in the complaint, so I am constrained to hold that this is based upon negligence as it stands now." (Trans. p. 54.)

An analysis of the amended complaint shows that the necessary allegations of a cause of action for breach

of contract are lacking. It is but elementary to say that an action for the nonpayment of money alleged to be due under a contract must aver such nonpayment. This is usually done by direct allegation, but is sometimes done indirectly by an allegation of indebtedness or the refusal of a demand for payment. 31 Cyc. (Pleading) 103, Notes 7 and 8. Furthermore to constitute a sufficient pleading to support recovery for a breach of contract in which the plaintiff is subject to the performance of certain conditions precedent, allegations of such performance or an excuse or waiver of performance is essential. As stated in 31 Cyc. (Pleading) 107, Sec. 12:

> "Where conditions precedent to the right of action exist, their performance must be alleged by plaintiff in order to state a cause of action, or where there has been no performance and plaintiff intends to rely upon matter excusing performance, such matter must be alleged."

Among its provisions the amended complaint alleges the corporate character of the parties, the ownership of the freight cars, the existence of the insurance policy, the operation by the defendant of a train by virtue of a detour agreement, of which one of the provisions related to loss, damage, injury or death

> "which may be incurred or sustained by reason of such trains being detoured, or by reason of such trains being delayed in such detouring." (Trans. p. 8, lines 2-5.)

and the payment of certain costs and expenses in clearing wrecks and repairs

> "in which by reason of detour movements covered by this agreement the engines, trains or cars of the Foreign Company are concerned." (Trans. p. 8, lines 25-28.)

The complaint then states (paragraph V) that the defendant was negligent in certain particulars and that

> "while said train of defendant was so being run, and *by reason of such negligence*" (Trans. p. 9, last two lines.)

the freight cars were set on fire. In paragraph VI it is alleged that plaintiff paid $3,056.49 to the Spokane, Portland & Seattle Railway Company under its insurance policy on account of the loss and damage resulting

> "by the fire so caused and set" (Trans. p. 10, line 7.)

The last paragraph of the complaint pleads the condition of its insurance policy

> "that if plaintiff should claim that any fire causing loss or damage insured against was caused by the act or neglect of any person or corporation, the plaintiff should, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting from such fire, and that such right of recovery should be assigned to plaintiff by the insured on receiving such payment." (Trans. p. 11.)

Thereafter the only allegations are those concerning the payment by the plaintiff to the Spokane, Portland & Seattle Railway Company and the assignment of the latter to the plaintiff and the ownership by the plaintiff of the assigned claims.

Considering this complaint, it will be noted in the first place that there is no allegation in the complaint that any damage was incurred or sustained by reason of trains being detoured or detour movements, but on the contrary it is expressly stated that the damage complained of occurred

> "while said train of defendant was so being run, and by reason of such negligence." (Trans. 9, last two lines.)

Secondly, it will be noted that there is no allegation of performance either by the plaintiff as assignee or the Spokane, Portland & Seattle Railway Company of the obligations to be borne by either under the detour contract.

Third, there is absolutely no allegation of nonpayment or non-performance by the defendant under the detour contract or any indirect statement of indebtedness, demand and refusal or other equivalent terms from which the breach by the defendant could be inferred. For aught that appears in the complaint the defendant may have fully settled with the Spokane, Portland & Seattle Railway Company all the obligations of the defendant under the detour contract.

Finally, it should be noted that the right of assignment accorded to the plaintiff by the insurance policy is conditioned on a certain claim to be made by the Insurance Company, and there is no allegation by the plaintiff that such claim was made.

As to the first of these defects, no extended explanation is necessary. A certain result may transpire *while* a train is being run and yet may not have occurred *by reason of* such operation. In fact, the plaintiff in error in paragraph IV of its amended complaint alleges that at the time of the fire the weather was hot and dry and the vegetation and structures and objects along and adjacent to the track of the Spokane, Portland & Seattle Railway Company were dry and inflammable. The defendant was not responsible for either of these conditions, but the defendant's knowledge thereof was alleged in support of its cause of action in tort for the alleged destruction of the property by negligence. Certainly it does not seem reasonable that plaintiff in error can fairly contend that the allegation of the complaint that fire was set

> "by reason of such negligence"

(as such items of negligence were thereafter more particularly specified) is an allegation under the contract that the loss occurred or was sustained

> "by reason of such trains being detoured or by reason of such trains being delayed in such detouring" or
>
> "by reason of detour movements covered by this agreement" (in which) "the engines, trains or cars of the Foreign Company are concerned."

That this cannot be done under the decisions of the Supreme Court of Oregon clearly appears from the case of Miller vs. Hirschberg, 27 Oregon 522, 535-6, 40 Pac. 506, wherein it was said:

> "The contention for the defendant is that, as the court found the allegation of fraud in the complaint to be untrue, the remaining facts as found by it only show a breach of an implied contract of sale, and, therefore, under the well settled rule that a recovery cannot be had on a complaint which in terms alleges a cause of action sounding in tort by proof of the breach of a contract express or implied, the judgment must be reversed. If the premises upon which this argument is based are conceded, the conclusion inevitably follows, for the rule referred to is too well settled to be questioned. After a careful consideration of the able reargument of this case, and a re-examination of the record, we concur with counsel that the complaint sounds in tort, and will not support an action on a contract, and the holding to the contrary in the former opinion is erroneous. The plaintiff must recover in tort, or not at all. He has so laid his cause of action, and must abide the result."

This case was lately cited with approval by the same court in Gary Coast Agency, Inc. vs. Lawrey, 101 Oregon 623, 627; 201 Pac. 214, wherein the court speaking by Burnett, C. J., discusses Miller vs. Hirschberg, *supra,* as follows:

"The doctrine of that case is, that one cannot allege a tort and prove a mere breach of contract. The question of misjoinder was not discussed. The other precedents cited under that point are substantially to the same effect. Practically, the defendant relies upon both fraud and breach of warranty. It may well be said that a plaintiff cannot join tort and contract in the same action."

To the same effect, see Savage vs. Salem Mills Co., 48 Oregon 1, 10-11; 85 Pac. 69, as follows:

"Mr. Chief Justice Bean delivered the opinion. The defendant contends that the complaint states a cause of action for breach of the contract under which the wheat was delivered by plaintiff and his assignors and received by it, and also for a conversion of such wheat; hence the demurrer to the complaint, or the motion made at the trial to require the plaintiff to elect upon which cause of action he would proceed, should have been sustained. But as we read the complaint, it states but one cause of action, and that on contract. It sets out in detail the terms of the agreement under which the wheat was delivered and received, and alleges a breach thereof. There is no charge that the wheat was wrongfully or unlawfully converted by the defendant to its own use, but, on the contrary, the allegation is that under the contract the defendant was entitled to use the wheat as part of its consumable stock and to sell or manufacture it into flour at its pleasure, discharging its liability to the plaintiff and his assignors by either deliver-

> ing to them other wheat of the same grade and quality, or by paying the market price of such wheat when demanded. A demand and refusal were necessary under the contract in order to fix the defendant's liability, for it was not required to pay for the wheat delivered, either in kind or in money, until requested to do so."

The rule is tersely stated in 31 Cyc. (Pleading) 104, as follows:

> "some duty or obligation must be shown to rest upon the party sought to be charged, a neglect or breach *of which* has resulted in the injury complained of."

As to the second defect, an examination of the amended complaint will fail to disclose any allegations of the terms or substance of the detour contract, except for the meager reference thereof quoted in paragraph III. (Trans. pp. 7 and 8.) Neither was the contract introduced in evidence nor any testimony introduced to show its terms or conditions, nor the consideration paid by the Spokane, Portland & Seattle Railway Company to procure its execution by the defendant. In quoting some of the provisions, counsel for the plaintiff in error must have had knowledge of the other terms, and if at the time of filing of the amended complaint it was the intention of counsel to commingle a cause of action for negligence with a cause of action on contract for breach of the detour agreement, it seems incomprehensible that attorneys so experienced as counsel for plaintiff in error should have neglected the necessary allegations and proof of these matters.

In the case of Johnson vs. Homestead-Iron Dyke Mines Co., 98 Ore. 318, 327, 193 Pac. 1036, error was assigned predicated on the action of the lower court in overruling defendant's motion requiring the plaintiff to elect upon which of his alleged causes of action he would rely. In considering the sufficiency of the pleading, the Supreme Court said:

> "The court committed no error in overruling defendant's demurrer. The plaintiff's rights grew out of the alleged breaching of the contract by defendant. The plaintiff pleads the making of the contract, its terms, the consideration, performance by plaintiff, breach by defendant, and damages." (Citing several cases.)

The amended complaint in this action obviously fails to include these essentials. The statutory requirements devolving upon plaintiff are stated in Section 88, Olson's Oregon Laws, as follows:

> "Performance of Condition Precedent. In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading shall be bound to establish on the trial the facts showing such performance. (L. 1862; D. Sec. 86; H. Sec. 87; B. & C. Sec. 88)."

As pointed out above, a third essential to a good cause of action on contract has been omitted from the

complaint by reason of the failure of the plaintiff to allege non-payment of the sum claimed, or an allegation of indebtedness or other averment from which it could be ascertained with certainty that the defendant had broken its covenant.

In Pacific Bridge Co. vs. Oregon Hassam Co., 67 Oregon 576, 580, 134 Pac. 1184, the court said:

> "The complaint herein does not aver that in consequence of the breach of the agreement the plaintiff sustained any damages, but charges that by reason of the facts alleged in the initiatory pleading the defendant became indebted to the plaintiff, etc. The defect in the complaint in this particular renders it insufficient to sustain a judgment for damages, though a witness for plaintiff testified in respect to the loss claimed to have been occasioned by the breach of the contract: Bohall vs. Diller, 41 Cal. 532."

In fact, the bill and voucher sought to be introduced in evidence by plaintiff, and rejected by the court, upon which the first specification of error is predicated (Trans. pp. 70-73) would refute any claim of plaintiff in error that the defendant was in default under the detour contract.

Paragraph VII of the complaint alleges the conditions precedent devolving upon the insurance company under its policy of insurance with the Spokane, Portland & Seattle Railway Company as to the claims and payments to be made by the insurance company before

it was entitled to demand and receive an assignment. Subsequently there is an allegation that the payment was made, but nowhere is there an allegation (either generally in the form prescribed by Section 88, Olson's Oregon Laws, supra, or specifically by averment) that the plaintiff had preferred a

> "claim that any fire causing loss or damage insured against was caused by the act or neglect of any person or corporation." (Complaint, Paragraph VII, Trans. p. 11.)

This is the final objection made above and it is sufficient in itself to sustain the ruling of the trial court that the amended complaint stated only a cause of action based on negligence.

In Fire Ass'n of Philadelphia vs. Schellenger, 94 Atl. 615, the insurance company issued one of its policies of insurance upon the property of Schellenger, the defendant, containing a cause identical with that pleaded by plaintiff in error herein. A loss occurred and was settled with the assured. Later Schellenger sued a railroad company, claiming that the latter's negligence had caused the loss. Schellenger received a verdict in excess of the amount paid by the insurance company, which was compromised by the Railroad Company for a sum likewise in excess of the insurance company's payment. Schellenger executed to the railroad company a general release of all liability for loss or damage occasioned by the fire. The insurance company, claiming the right of subrogation, sued Schellenger for reimbursement of the moneys paid. In the lower court re-

covery was permitted which was reversed on appeal in a decision as follows:

> "Whatever may be the extent of the right of subrogation residing in an indemnitor, under such a state of facts as the present case exhibits, in the absence of any agreement upon the subject between the indemnitor and the indemnitee, we see no reason for denying the power of the parties to curtail, or even to destroy it by mutual consent, if they see fit to do so. An agreement to that end runs counter to no provision of the written law, and is not opposed to any public policy of the state. The right of subrogation is a mere personal one, conferred solely for the benefit of individuals; and a right of this character may always be waived by the party in whom it resides. Quick vs. Corlies, 39 N. J. Law, 11. The rights of the parties to this litigation, therefore, must depend upon the meaning of the provision of the policy which deals with the matter of subrogation.
>
> It is plain from a reading of this part of the contract that the parties to it intended that the right of the insurer, in case it paid the loss, should not be an absolute, but a conditional one; the condition being that the insurer should 'claim that the fire was caused by the act or neglect' of some third person. We think it equally clear that the agreement contemplates that such claim should be made by the insurer to the insured at or before the time when it paid the loss. This appears from the fact that by its terms the right to subrogation, if it

comes into existence at all, becomes complete when the payment is made. The language used is 'this company shall on payment of the loss be subrogated,' etc., 'and such right shall be assigned to this company by the insured on receiving such payment.'

There is no suggestion, either in complainant's bill or in the proofs submitted by it at the hearing, that it made any claim to the defendant that the fire against which it had indemnified him had been caused by the act or neglect either of the Atlantic City Railroad Company or of any other person, until many months after it had paid the moneys due under its policy. On the contrary, the fact appears that it made no such claim prior to the filing of its bill in this cause. Its failure to assert such claim at or before the time when the payment was made was a failure to comply with the condition upon which its right to subrogation depended, and terminated the existence of that right, leaving the defendant free to so deal with the person responsible for the fire, with relation to a settlement of any claim against such person, as he might see fit, without any liability to be called to account by the complainant for any of the proceeds of such settlement."

Likewise in Home Insurance Co. vs. Hartshorn, 91 Southern 1, a storage company filed a bill of interpleader against the insurance company and Hartshorn to determine which was entitled to certain moneys recovered in a judgment for the destruction of cotton by

fire. Hartshorn was the owner of the cotton upon which the insurance company had issued its policy. After the fire a settlement was made between the insurer and insured, whereupon the owner sued the storage company for the value of the cotton burned. One of the provisions of the insurance policy was identical with that involved here. The insurance company claimed to be entitled by subrogation to participate in the proceeds of the judgment to the extent of its payment. The insured interposed a demurrer to the insurance company's cross-bill which was sustained. In affirming this judgment, the court said:

> "The right of the appellant to be subrogated to the appellee's claim for damages for the destruction of the cotton covered by the insurance policy being expressly provided for in the policy, its right thereto must be measured by and depends solely on the terms of the clause of the policy dealing therewith and hereinbefore set forth.
>
> One of the requirements of this clause of the policy is that:
>
> 'If this company shall claim that the fire was caused by the act or neglect of any person * * * this company shall, on payment of the loss, be subrogated,' etc., the meaning of which necessarily is that the claim must be made to the insured at or before the time of the payment to the insured of the loss under the policy, and the reason for the requirement probably is that the insured may have an opportunity of taking into consideration when settling with the insurer the fact that the damages

to be recovered from the person by whose fault the property was destroyed will go to him or to the insurer as the case may be. If such a claim can be made at any time, then any provision therefor in the policy would be useless, for the mere filing of a suit by the insurer against the person whose act or neglect caused the fire would be a sufficient claim that the fire was so caused. * * *

The cross-bill should, but does not, allege that such a claim was made to the insured at or before the time when the loss was paid."

Of a similar nature are the cases of Sun Insurance Office of London vs. Heiderer, 99 Pac. 39, and Traders' Insurance Company vs. Race, 31 N. E. 392. In each of these cases the owner of property, subject to the lien of a mortgage, procured a policy of insurance to which was attached a mortgage clause protecting the mortgagee, to the extent of his interest, against invalidity of the policy through the fault of the insured, and further providing that if any loss should occur under the policy it should be paid to the mortgagee and if the insurance company should claim that no liability existed as to the mortgagor or owner, the insurance company should, upon such payment, be subrogated to the extent of such payment to the rights of the mortgagee under the mortgage. In each of the cases the insurance company contended that its bare statement that it claimed that there was no liability on the part of the company to the insured, without alleging any facts which, under the terms of the policy, would

exempt it therefrom, was sufficient to entitle it to subrogation of the securities. In denying this contention, the court in the Sun Insurance Company case said:

> "before he (the owner) can be deprived of such benefit, it must be shown that he has violated the provisions of the policy in some particular that renders it void as to him. His rights do not depend upon the mere claim of the insured. The appellant, therefore, to avail itself of the right to be subrogated to the rights of the mortgagee, instead of applying the payment of the loss toward the satisfaction of the mortgage, must allege and prove a state of facts which, under the contract of insurance, would entitle it to exemption from liability to the mortgagor." (Citing cases.) Sun Insurance Office of London vs. Heiderer, 99 Pac. 31, 41.

In the Traders' Insurance Company case the same rule is announced in different language.

Unless all the necessary averments of a cause of action arising on contract appear in the amended complaint, it cannot be said that there exists any duplicity in the pleading to which a motion for an election of remedies or a demurrer for misjoinder of causes of action could properly have been addressed or sustained. The conclusion is therefore inevitable that the sole cause of action stated in the amended complaint is for damage to property by negligence resulting from the alleged tortious acts of the defendant. In such a complaint the allegations setting forth a portion of the detour contract

could have no materiality or relevancy except on the hypothesis assigned by the trial court that it explained the reason why the defendant was upon the property of the Spokane, Portland & Seattle Railway Company. In adopting this construction in overruling defendant's motion to strike these allegations from the complaint the court reconciled the allegations of the complaint with the statutory requirements for good pleading and construed the pleading most favorably to the defendant. In this the plaintiff in error acquiesced and exhibited its full accord by the introduction of testimony designed only to support its allegations of negligence until it sought to have admitted in evidence as an admission of liability (Trans. p. 34) a bill and voucher check produced from the defendant's files upon plaintiff's demand (Trans. p. 33). When, in the succeeding discussion, it appeared that the documents tendered could not fairly be considered as an admission of liability because the Spokane, Portland & Seattle Railway Company and the plaintiff Insurance Company did not occupy the same relationship to the defendant company—as conclusively appeared from the documents themselves and the brief excerpt of the detour contract alleged in the complaint—an inducement arose to ascribe a double aspect to the complaint which is not borne out by careful inspection nor sanctioned by orderly practice or the statutes or decisions of Oregon.

The cases of Harvey vs. Southern Pacific Company, 46 Oregon 505, 80 Pac. 1061, and Hoag vs. Washington-Oregon Corporation, 75 Oregon 588, 144 Pac. 574, 147 Pac. 756, relied upon by plaintiff in error are not

inconsistent with the contention made by us in any respect. In the Harvey case the court said:

> "The right of action is essentially the same, but the relief is different." (p. 512.)

and in the Hoag case:

> "But in the case at bar the measure of damages is the same in either case; the difference between the common-law liability and that arising under the statute being that additional duties on the part of the employer to the employee are added by the statute to those existing at common law. The whole obligation of the employer to the employee is the sum of all the duties imposed by law, whether common law or statute, and the rights of the employee to redress for a breach of these duties arises from the law, considered as a whole, irrespective of its source." (p. 602.)

In endeavoring to reconcile the Harvey and Hoag cases to its views, the plaintiff in error in its brief states:

> "The measure of recovery was precisely the same on either theory, namely, the loss inflicted by defendant's act." (Appellant's Brief, p. 33.)

We dispute this statement, as we will presently show, for if the detour contract can be construed to have required the defendant to pay a loss for which it would not have been liable in tort for negligence committed by it, the contract to this extent would be a contract of indemnity under which the plaintiff in error would be entitled, if at all, only to contribution to the

extent of the defendant's ratable proportion of the entire loss sustained. But eliminating, for the moment this feature of the case, it is quite plain that the decisions of the Oregon Supreme Court in the above cases are based in large measure, if not entirely, upon the principle that even though the allegations of the complaint might support proof not only of a common law liability, but also of statutory liability, yet the obligations of the defendant embraced both of these duties. In other words, the court could affirmatively hold on appeal that the defendant in these cases could not have denied its duty to comply with the statutory provisions or to fulfill its common law duties. No such conclusion could have been reached by the mere incorporation into the complaint of a recitation of one of the provisions of a contract—especially in the absence of a plea by the plaintiff of full performance on its part of the conditions of the contract or breach of the contract by the defendant—for the obvious reason that without proper pleading or proof no one can state what the obligations of the defendant were under the contract. In short, "the whole obligation" under the common law and under the detour contract cannot now be determined because all the detour contract and the acts of the parties thereunder were not before the court. Consequently, it would have been error for the court to have construed the action except as one based on negligence and one supporting a judgment only if founded on proof of negligence.

THE ASSIGNMENT TO PLAINTIFF

In order to claim the advantage of the detour contract, plaintiff pleads and has introduced in testimony the assignment from the Spokane, Portland & Seattle Railway Company. Under such assignment it is contended that plaintiff is entitled to claim all the benefits of the detour contract. Assuming that the plaintiff made the claim which entitled it to demand the assignment, and assuming that the Spokane, Portland & Seattle Railway Company could, without notice to or the assent of the defendant, have executed to the plaintiff an assignment of the detour contract, these questions arise: To what extent, if any, do the provisions of the insurance policy limit or permit the assignment? Does the assignment introduced in evidence, as thus limited or permitted, include a total or partial assignment of the rights of the Spokane, Portland & Seattle Railway Company under the detour contract?

Section 6457, Olson's Oregon Laws, in part provides:

> "That from and after the first day of September, 1911, no fire insurance company, corporation or association, their officers or agents, shall make, issue, use or deliver for use any fire insurance policy, or renewal of any fire policy on property in this state other than as shall conform to the following conditions, which conditions shall be contained upon page two of such policy of insurance, and which shall form a portion of the contract be-

tween such insurer and insured, and which shall read as follows: (then follows the conditions referred to, which are those known as the New York Standard, among which are the following):

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; * * * or if the hazard be increased by any means within the control or knowledge of the insured; * * * or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants, without increase of hazard) whether by legal process or judgment, or by voluntary act of the insured, or otherwise; * * *"

"This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by an expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for reinsurance shall be as specifically agreed hereon."

"If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured *for the loss resulting therefrom,* and *such right* shall be assigned to this company by insured on receiving such payment." (Italics ours.)

"Wherever in this policy the word 'insured' occurs, it shall be held to include the legal representative of the insured, and wherever the word 'loss' occurs, it shall be deemed the equivalent of 'loss or damage.' "

Similar provisions apply in the State of Washington pursuant to the terms of Section 7152, Remington's Compiled Statutes of Washington, 1922, which reads in part as follows:

"on and after January 1, 1912, no fire insurance company shall issue any fire insurance policy covering on property or interest therein in this state other than on form known as the New York Standard as now or may be hereafter constituted, except as follows: (Enumerating exceptions not material here.)"

From the above it will be observed that the claim to be made by the insurance company is that the fire was caused by the act or neglect of any person or corporation, and if so made the right of recovery by the insured for the loss resulting therefrom—that is, for

the loss resulting from the fire caused by the act or neglect—is the right to be assigned. We believe that as used in the standard policy, which is the form used by the planitiff in error in this case, that the phrase "by the act or neglect" necessarily implied some improper or wrongful act or neglect in the performance of some obligation prescribed by common law or statute. The plaintiff in error contends that the word "act" standing alone is sufficient to include anything which might be claimed by the insurance company. This construction is certainly too broad if we give effect to the requirement that the act or neglect must cause the fire.

As stated by the Supreme Court of Oregon in the case of Milwaukee Mechanics' Ins. Co. vs. Ramsey, 76 Ore. 571, 149, Pac. 542, L. R. A. 1916 A 556, 558:

> "Again, if insured property is burned by the *tortious act* of one not a party to the policy, the insurance company, paying the loss to anyone to whom, by the terms of the policy, payment must be made, is subrogated pro tanto to the chose in action the payee has *against the tort feasor.* The reason in such a case is that, but for the *wrong* resulting in destruction of the property, no liability would have accrued against the insurance company; but, as it has neither privity of estate or contract with the incendiary, and is nevertheless compelled by the policy to pay *for the result of the tort,* its reimbursement is accomplished by subrogation."

The same court in American Central Insurance Co. vs. Weller, 212 Pac. 803, had under consideration a

claim by an insurance company, technically supported by the terms of its policy and the transactions of the parties which it sought to enforce against the defendant, Weller, concerning whom the court said:

> "he (Weller) is not accused of any *wrongful act* (p. 804)" and
>
> "It is unquestionably the general rule that on payment of a loss the insurer acquires the right to be subrogated pro tanto to any right of action which the insured may have against any third person *whose wrongful act or neglect* caused the loss. 14 R. C. L., p. 1404, Sec. 568, note.
>
> The facts in the case at hand do not bring the case within the rules above stated, or the authorities cited by counsel for plaintiff." (p. 805.)

In view of the foregoing, and especially because of the provisions of Section 7147, Remington's Compiled Statutes of Washington for 1922, punishing as a misdemeanor any company or person knowingly violating any provision of the insurance code for which no penalty is provided, the case of Fort vs. Globe & Rutgers Fire Insurance Co., 169 N. Y. S. 229, affirmed 173 N. Y. S. 595. Appeal dismissed, 125 N. E. 918, is extremely interesting as the expression of the New York courts upon the effect of statutes providing for the standard form of insurance policy later adopted by the states of Oregon and Washington. In that case the plaintiffs were the owners of real property in New York—some for a life interest, and the others for the remainder. The holder of the life estate, who was charged under

a will with the duty of insuring the property, procured a policy from the defendant. Although he explained the nature of the title to the agent of the defendant through mutual mistake the policy was issued solely in the name of the owner of the life estate. On expiration a new policy was issued in the same terms. While the latter policy was in force, the City of Albany commenced a condemnation action to secure the insured property, which resulted in proceedings, shortly before the fire, confirming the sum to be paid to the owners as compensation. The fire occurred before payment of the compensation, at which time title would actually pass to the city. Proof of loss was rejected by the insurance company because the property was not insured in the name of the true owner, and also because under the condemnation proceedings the insurers were divested of title and the policy made void for want of an insurable interest by the insured. An action was commenced to reform the policy and collect the loss. In answer the insurance company contended that the policy was void, and also that the insurer was subrogated to the rights of the insured against the city, to the extent of that part of the condemnation award, which the defendant may be obliged to pay under the policy.

The Supreme Court permitted the reformation, determined the policy valid, allowed recovery, and denied subrogation on equitable grounds.

On review, the Appellate Division affirmed the judgment but assigned to the denial of subrogation these grounds:

"We concur in his (Mr. Justice Rudd) opinion, except that we think the argument that the plaintiffs have impaired the defendant's right of subrogation should be answered differently. Section 121 of the Insurance Law, at the time this policy was issued (Chapter 181 of Laws of 1913), required a standard fire insurance policy containing definite agreements and conditions and provided that:

'No other or different provision, agreement, condition or clause shall be in any manner made a part of such contract or policy or indorsed thereon or delivered therewith, except as follows (the exceptions not being here material):'

"A violation of this statute was made a misdemeanor. Penal Law (Consol. Laws c. 40) Sec. 1193.

"The policy in this case, complying, of course, with the requirements of the statute, provides for subrogation if it is claimed that the fire was caused by the act or neglect of any person or corporation, and provides for subrogation in no other case. The right of subrogation may rest on equitable principles and not necessarily in contract. But when, as here, the Legislature specifically declares in effect that such right may be made the subject of contract in one particular instance, and in no other, and makes it criminal to contract for the right of subrogation in other respects, it is reasonably clear that the legislative purpose was that such right of subrogation should not be exercised, save in the

specific instance. It would have been a crime for the defendant to insert in this policy a provision giving it the right which it now asserts as a defense to this action (Citing cases)."

Section 7147, Remington's Compiled Statutes of Washington, 1922, above referred to, reads as follows:

> "General Penalties. Any company or person who knowingly violates any provision of this act for which no penalty is provided, shall be deemed guilty of a misdemeanor and shall be punished as provided by law."

Among the foregoing provisions of the standard policy it will be observed that changes of occupants of the insured property when made "without increase of hazard" do not affect the right of recovery by the insured in event of loss. On the other hand, if the assured permitted a change of occupants of the insured property, with increase of hazard, the policy became absolutely void and settlement for any loss thereafter occurring might rightfully be refused by the insurance company to the insured.

In this case the plaintiff pleads in its amended complaint that the defendant was running its train over the tracks of the Spokane, Portland & Seattle Railway Company (the insured), under an agreement between the defendant and the insured. To the extent that this occupancy of the property of the assured was accomplished without increase of hazard, it was permitted by the express terms of the policy and the verdict of the

jury in this case in favor of the defendant, on the issues of negligence submitted to it, and the evidence offered by the insurance company of its payment of the loss necessarily establish the fact that the defendant in occupying the right of way of the Spokane, Portland & Seattle Railway Company for the movement of its trains did so without increase of hazard. Otherwise, why did not the insurance company treat the insurance policy as void by the voluntary act of the insured?

The answer is apparent. The occupancy of the property of the Spokane, Portland & Seattle Railway Company by other railroads for railway purposes was contemplated and the risks therefrom compensated for when the policy was issued. We believe that counsel for plaintiff in error would hardly contend that whenever fire damaged a house occupied by a tenant, an insurance company paying the loss could hold the tenant responsible therefor without proof of negligence by the simple expedient of demanding an assignment from the insured. And yet in this case, though one of the special conditions of the policy read as follows:

> "It is a condition of this policy that fuel oil and coal only are used (except in Cars Nos. 1101 and 1102 which are gasoline, electric motor cars) for fuel in locomotives on the line of this road. The use of wood for kindling is permitted."

the plaintiff in error nevertheless endeavored to convince the jury that the defendant was guilty of negligence under the testimony introduced in support of the allegation in Paragraph V of its amended com-

plaint, wherein it was charged that

> "defendant carelessly and negligently hauled said train with its engine or engines burning coal."

The transaction is in many respects similar to that in Milwaukee Mechanics' Ins. Co. vs. Ramsey, supra, where the insurance company having issued its policy on property belonging to Ramsey, with a clause making the loss payable to a mortgagee bank, later sought, under a claim of subrogation from the bank, to recover its loss from the owner. The Supreme Court, in affirming a decree sustaining a demurrer to the complaint and dismissing the suit, pointed out that if Ramsey's acts under the policy constituted a breach of that contract the insurance company was not bound to pay anything so that its disbursement was voluntary and not recoverable. So in this case, if the Spokane, Portland & Seattle Railway Company permitted the occupancy of its property with an increase of hazard rendering the policy void, it will not avail the insurance company claiming under an assignment derived from the Spokane, Portland & Seattle Railway Company to urge that it is entitled to reimbursement by reason of the hazards resulting from such occupancy.

In this connection, it is pertinent to consider the Article of Subrogation executed by the Spokane, Portland & Seattle Railway Company (Trans. pp. 27, 28). In the first paragraph recitation is made of the policy of insurance and in the second the occurrence of a fire stated to have been caused by sparks from a locomotive of the defendant by which the insured property was

damaged or destroyed, whereupon an assignment is made of all rights and things in action against persons, including the defendant

> "who may be liable, or hereafter adjudged liable for burning or destruction of said property."

Finally the plaintiff is authorized to sue, compromise and settle in the name of the Spokane, Portland & Seattle Railway Company, or otherwise, and is subrogated to all the rights of the Spokane, Portland & Seattle Railway Company "in the premises to the amount so paid."

If the Spokane, Portland & Seattle Railway Company had intended by this document to have assigned to the plaintiff its rights under the detour agreement, would not execution of the detour agreement have been recited with the same particularity as was the insurance policy? And does not this omission and the express statement of "rights in the premises" limit the effect of the document to the insurance policy? That this is the proper construction is borne out by the fact that there is no proof that notice of the assignment was given to the defendant and by the fact that the bill of the Spokane, Portland & Seattle Railway Company was its separate bill (and not a joint bill with the insurance company) in which the defendant was given credit for the salvage and insurance. This construction is also substantiated by the filing of the complaint in this cause for the full sum of $3,056.49, whereas if the insurance company had then intended to rely upon an assignment of the detour contract as a covenant by the

railroad of indemnity it would have sued only in a lesser sum for the contribution recognized in the policy. The detour contract as now construed by plaintiff in error is purely a contract of indemnity or insurance—for it is claimed that thereunder the defendant is liable without proof of negligence—and in such a contingency the theory of contribution would be applicable.

However, to entitle the plaintiff to claim the right of contribution, it should, before settlement of the loss with the insured, have sought an agreement with the defendant as to the proper adjustment and apportionment of the loss. This it did not do. The rule is thus stated in 26 Corpus Juris "Fire Insurance" (p. 455):

> "Pro rata liability. Where each policy stipulates to pay the proportion of the loss which the amount insured by it bears to the whole amount of insurance on the property, the contracts are independent, and each insurer binds itself to pay its own proportion without regard to what may be paid by others and no right of contribution exists in favor of either of them; unless they enter into an independent agreement among themselves in respect to adjusting and apportioning the loss, and through mistake the adjustment and apportionment is so made that one or more of them are compelled to bear a larger proportion than they are legally bound to do, in which case they are entitled to recover the excess from the other insurers. But if of several policies one only contains the clause providing for a ratable payment, and the others not

> containing such clause pay more than their ratable share, they will be entitled to a proportionate contribution from the underwriters on the policy containing this clause."

Since, therefore, the assignment was not designed, and under the terms of the policy could not operate, to transfer to the plaintiff the rights of the Spokane, Portland & Seattle Railway Company under the detour agreement, the plaintiff could not maintain an action thereon, nor derive any rights thereunder against the defendant. In this connection see Wolf vs. American Traction Society, 58 N. E. 31, 51 L. R. A. 241, and Berry vs. Gillis, 17 N. H. 9, 43 Amer. Dec. 584.

THE DETOUR AGREEMENT

The argument of plaintiff in error does not decisively show which terms of the detour agreement narrated in the amended complaint are relied upon to establish a duty or obligation of the defendant which would entitle the plaintiff to recovery without proof of negligence. Certainly, there is nothing in the provision that

> "The Home Company shall not be held liable for or on account of any loss, damage, or delay of the trains, engines, cars or other property of any kind of either company."

which in any way implies that the Foreign Company would consider itself liable for any of the loss, damage or delay mentioned. The succeeding terms relating to

assumption of risk merely imply that the Foreign Company would not seek to evade its ordinary responsibility for its own negligent acts on the plea that the Home Company was primarily responsible. The full purport of the provision regarding assumption of risk is made plain from a consideration of the case of St. Louis, Iron Mountain & Southern Railway Co. vs. Chappel, 102 S. W. 893, 10 L. R. A. (N. S.) 1075, the syllabus of which is as follows:

> "A railroad company which permits a logging road to use its track with the engines and cars is liable for the destruction of neighboring property by sparks thrown by such engines."

A later case on the same subject is Bryant vs. Sampson Lumber Company, 93 S. E. 926, L. R. A. 1918 A 938, the syllabus of which is as follows:

> "A standard-built railroad operating under a quasi public franchise cannot without express legislative sanction contract or lease its road to an independent contractor so as to relieve itself from liability for fires negligently set out by the operation of the road. For other cases, see Railroads, I and II d, 7, in Dig. 1-52 N. S."

See also Quigley vs. Toledo Railways & Light Company, L. R. A. 1918 E. 249 and note.

From an examination of these cases one finds that in the past a railroad company permitting another to use its right of way has been subjected to loss through the breach of some common law duty by the licensee.

This unusual situation arises from the public nature of the business ordinarily transacted by a railroad company. To protect itself against the application of this principle and to compel the Foreign Company to respond to causes of action predicated upon the negligence of the Foreign Company, the terms of the detour agreement were designed. However, the detour agreement was not devised, nor has it been enforced, to require the Foreign Company to settle the torts of the Home Company which were committed by the Home Company while the Foreign Company was operating over the same line. The fact of negligence of the Home Company or Foreign Company is not eliminated by the detour agreement, but on the contrary is made the controlling factor.

The only remaining portion of the detour agreement alleged in the complaint is that portion providing that the Foreign Company

> "will pay, or cause to be paid, all costs, and expenses incurred by either Company in the clearing of wrecks, and repairs of equipment, track and property in which by reason of detour movements covered by this agreement the engines, trains or cars of the Foreign Company are concerned." (Trans. p. 8).

The use of the term "cost and expenses" as distinguished from "loss" and "damage" previously mentioned is significant in view of the action of the Spokane, Portland and Seattle Railway Company giving to the defendant proper credit for the proceeds from

salvage and insurance. The Spokane, Portland and Seattle Railway Company quite evidently construed the provision to entitle the defendant, as licensee, to the proceeds of the insurance. The payment of such an account, even if made in accordance with the terms of the contract, does not support the claim that the defendant admitted responsibility for any tortious act or any obligation not stated in the bill.

The plaintiff in error is endeavoring to treat an agreement for the payment of a debt as synonymous with an agreement to assume responsibility for damages to property whether occasioned with or without negligence. This is not sound in logic nor in accordance with equitable principles, nor the express language of the insurance policy. The recognition of such a principle eliminates the requirement of proof that the fire was caused by a wrongful act and would entitle the insurance company to recoup itself from any tenant of or licensee using the insured property who was, at the time of the article of subrogation, a debtor of the insured. In this manner the insurance company, by a subversion of equitable doctrines could reimburse itself for fire losses, which, for a premium, it had agreed to bear, and which transpired through no person's wrongful act. Such cannot be the law.

THE REJECTION OF DOCUMENTS

The plaintiff's offer of testimony embraced not only the bill rendered by the Spokane, Portland & Seattle Railway Company, but also the memoranda on it and

the draft or voucher check of the defendant. (Trans. p. 33.)

It is well settled that the bill of the Spokane, Portland & Seattle Railway Company is hearsay and inadmissible.

Mr. Justice Burnett, delivering the opinion of the Oregon Supreme Court in the case of Caro vs. Wollenberg, 83 Oregon 311, 323, 163 Pac. 94, announced the rule in Oregon in the following language:

> "In some instances there appear in the record what purport to be receipted bills from Carroll for some expenditures, but it is well settled that receipts of third parties constitute hearsay and are not to be received in evidence: Ellison vs. Albright, 41 Neb. 93 (59 N. W. 703, 29 L. R. A. 737). The doctrine governing that matter is that the receipt of one not occupying any official relation to the transaction is, in the first place, a declaration not under the sanction of an oath, and second, that the person making it is not presented for cross-examination by the adverse party. Receipts required by law, as for public taxes and the like constitute a manifest exception to the rule. Under these principles, therefore, the defendant failed to prove his charges for plumbing performed by the deceased Carroll."

This rule was again followed by the Supreme Court of Oregon in 1922 in the case of Backus vs. West, et al,

104 Oregon 129, 147, 205 Pac. 533, in which it was held that:

> "It has been held in Caro vs. Wollenberg, 83 Or. 311, 323 (163 Pac. 94), that the receipts of third parties for money payments are hearsay and consequently not admissible. They are the unsworn declarations of the party executing the receipts, the signer is not subject to cross-examination and they have no binding force whatever between strangers to the instrument."

This is also stated to be the rule in 22 Corpus Juris "Evidence" (pp. 207, 209) and in the case of Ellison vs. Albright, 29 L. R. A. 737, with note. See also Hornsby vs. Jensen, 78 S. E. 267.

As to the admissibility of the voucher, the cases stated by plaintiff in error recognize that no relaxation from the hearsay rule is justified unless the party to whom the payment is made stands in the same position to the party making the payment as does the person offering the instrument. That such a parity in fact exists must appear to the court before submission of the documents as evidence to the jury. As stated in Michigan Mutual Home Insurance Company vs. Pere Marquette Ry. Co., 160 N. W. 599, 601, cited by plaintiff in error:

> "whether the testimony is admissible in any particular case is a preliminary question to be decided by the trial court, and is analogous to the determination of the admissibility of confessions in criminal cases."

This court then considered the testimony which there showed that the assured had rendered a bill to the defendant for the entire loss, including that covered by the insurance, upon which the defendant made a payment on account, without any evidence indicating any intention to compromise the entire claim or deny its liability. On these facts this case is not in point here.

The remaining case on this point relied upon by plaintiff in error is the case of Weiss vs. Kohlhagen, 58 Oregon 144, which also states the requirement that the settlement with others, to be admissible, is contingent upon the showing that the payees were "in the same position as plaintiff" (Appellant's Brief p. 39). This was conceded by defendant to be the rule upon the trial in the lower court, as examination of the record will disclose. (Trans. p. 37.) We did contend, and still urge, that the position of the defendant and the Spokane, Portland & Seattle Railway Company, by virtue of the contractual relationship disclosed by the plaintiff's allegations of the detour contract, was entirely dissimilar from our relationship to the plaintiff claiming as an assignee under the insurance policy. It would be unprofitable to discuss at extended length other cases in which, of course, the facts were different, but in the case of Puget Sound Electric Railway vs. Van Pelt, 168 Fed. 208, this court found that there was no error committed by the trial court in excluding, from the trial of a case for personal injuries, evidence of a settlement made by the plaintiff with an accident insurance company under a policy covering the same occurrence. So in Moore vs. Stetson Machine Works, 188 Pac. (Wash.)

769, the court reversed a judgment for plaintiff, for damages sustained in an automobile collision, on account of the error of the lower court in admitting testimony showing that the defendant's agent had voluntarily repaired the plaintiff's automobile and had requested from plaintiff the execution of a release.

In the footnote to the quotation from 22 Corpus Juris (p. 320) set forth by plaintiff in error on p. 40 of appellant's brief, numerous cases are cited for the proposition that

> "where several persons are injured in the same accident a compromise with one cannot be shown in an action by the other."

In no event could the voucher check be considered as an admission that under the detour agreement the defendant was liable without proof of negligence, for, as to this, it is stated in 22 Corpus Juris "Evidence" Sec. 325 (p. 298) that statements or admissions relating to a question of law are not admissible in evidence, for the reason that a party should not be affected by statements which may be attributed to a misapprehension of his legal right.

All the evidence was rightfully excluded.

THE REFUSAL OF REQUESTED INSTRUCTION No. 4

Plaintiff in error claims that it was entitled to the submission of this instruction if its construction of the detour agreement entitled it to recovery without proof of negligence upon the part of the defendant. We desire to point out, however, that there are ambiguities and material errors in the requested instruction, aside from the point above mentioned, which justified its refusal. In the first place the requested instruction refers to "this train" (Trans. p. 74) which is ambiguous and uncertain in that the plaintiff in error in its amended complaint only specified

> "an east bound freight train of the defendant which passed said point at about noon of said day" (Trans. p. 7).

This allegation was denied except that it was conceded that about noon of that day one of the defendant's east bound freight trains with engines Numbered 2113 and 2128, controlled by the pilot engineer and the train dispatcher of the Spokane, Portland & Seattle Railway Company, was operated near McLaughlin, Washington (Trans. pp. 14, 15). There is testimony in the record as to the movement of other trains on the same day and at the same place. The instruction should have been definite as to the train, and if designed to summarize the pleadings should have conformed to the defendant's answer.

The instruction further states that the defendant "assumed liability to the Spokane, Portland and Seattle Railway Company" (Trans. p. 74) while the provision of the detour contract is merely that the Foreign Company will hold the Home Company harmless from and against all liability. The instruction further assumes conclusively that the plaintiff was the assignee of the Spokane, Portland and Seattle Railway Company, which was a point in issue.

For the foregoing errors, the requested instruction should have been refused as well as for the direction therein given the jury to return a verdict against the defendant without proof of negligence committed by it.

There being no error in the proceedings in this case, the judgment of the Distrit Court should be affirmed.

Respectfully submitted,

A. C. Spencer,
Arthur A. Murphy,
Attorneys for Defendant in Error.

No. 4204

United States

Circuit Court of Appeals

For the Ninth Circuit.

EMERY VALENTINE,

Appellant,

vs.

R. E. ROBERTSON, B. M. BEHRENDS, as Treasurer of the City of Juneau, Alaska, and the City of Juneau, Alaska,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

WICKERSHAM & KEHOE, Juneau, Alaska,
GROVER C. WINN, Juneau, Alaska,
Attorneys for Appellant.

HELLENTHAL & HELLENTHAL, Juneau, Alaska,
R. E. ROBERTSON, Juneau, Alaska,
Attorneys for Appellees.

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 2369–A.

EMERY VALENTINE, for Himself, and All Other Taxpayers of the City of Juneau, Alaska,

Plaintiff,

versus

R. E. ROBERTSON, B. M. BEHRENDS, as Treasurer of the City of Juneau, and the CITY OF JUNEAU, ALASKA,

Defendants.

AMENDED COMPLAINT.

Comes now the defendant by leave of the Court first obtained and files this amended complaint and for cause of action against the defendants alleges:

I.

That at all times mentioned in the pleadings in this cause and for more than ten years last past the plaintiff was and now is a citizen of the United

States, a resident within the City of Juneau, Alaska, and a large owner of both real and personal property, and was at all such times and now is a taxpayer in said City of Juneau, Alaska, wherein he has been elected Mayor several times; that at all times during the said period and now the plaintiff has paid large sums of taxes on his said property in said Juneau, Alaska, and that a large sum of the moneys in the City Treasury of Juneau represents, was and is the very moneys so paid by this plaintiff into said City Treasury.

II.

That B. M. Behrends, defendant, is now and at all the times herein complained of was the duly elected, qualified and acting municipal treasurer of said City of Juneau, and as such was and is the lawful custodian of all public moneys raised therein by general taxation upon property in said City for municipal purposes; and was in [1*] possession of the sums of public money hereinafter mentioned at the time of the passage by the Common Council of the City of Juneau of the ordinance of resolution hereinafter mentioned, and is now in the lawful possession of the sum of Five Hundred ($500.00) Dollars thereof.

III.

That on the 18th day of January, 1924, at the rooms of the City Hall in Juneau, Alaska, the Common Council of said City of Juneau met in regular session, and then and there passed an ordinance of resolution in writing by the unanimous votes of all

*Page-number appearing at foot of page of original certified Transcript of Record.

the members of said Council, except H. R. Shepard who was absent, appropriating the sum of Two Thousand ($2,000.00) Dollars, out of the public money in the treasury of and belonging to said city, raised by said city by general municipal taxation in the said city upon all the real and personal property therein, including that of this plaintiff, subject to taxation for general municipal purposes, and in the said ordinance or resolution directed that said sum be paid to a competent person to be selected by the Common Council of the City of Juneau to compensate him and to defray his expenses to Washington, D. C., and there and return, to engage him while there to lobby before Congress of the United States and to present before Congress and other public authorities the necessity and desirability of the division of the Territory of Alaska into two territories; the erection of a Government dock at Juneau, the erection of a Government building at Juneau, the dredging of Gastineau Channel near Juneau, the digging of Hawk Inlet Canal, the digging of Oliver Inlet Canal, the establishment of a mail route on the north shore of Chichagof Island, in Southeastern Alaska, the establishment of a Land Office in Juneau, the dredging of Wrangell Narrows, in Southeastern Alaska.

IV.

And on said 18th day of January, 1924, at the said meeting of [2] said Common Council of the City of Juneau, Alaska, and after the passage of the said ordinance or resolution, the said Common Council by said unanimous votes of all its members

there present, only excepting Shepard who was absent by formal action written in its records selected and empowered and employed the defendant, R. E. Robertson, as the delegate to go to the City of Washington, D. C., under said ordinance or resolution, and perform the various acts of lobbying for the enactment of legislation by Congress to procure the division of the said Territory of Alaska and other objects set forth in said ordinance or resolution.

V.

At the said meeting of said Council on said January 18, 1924, as aforesaid, it was ordered by said unanimous votes of said Councilmen present that a warrant be drawn for the sum of Fifteen Hundred ($1,500.00) Dollars, on the City Treasurer, B. M. Behrends, in favor of the delegate, R. E. Robertson, and that he be privileged, if found necessary to draw on the City Treasury for an additional Five Hundred ($500.00) dollars, being the whole of said sum of Two Thousand ($2,000.00) Dollars, so appropriated by the said ordinance or resolution.

VI.

That the said R. E. Robertson accepted the employment so tendered to act as such lobbyist as aforesaid, and to make the trip to Washington, D. C., and return for the objects described in said ordinance or resolution, and thereafter a warrant was signed by the Mayor of the City of Juneau, and countersigned by its municipal clerk in the sum of Fifteen Hundred ($1,500.00) Dollars, and delivered to the said Robertson, and was by him pre-

sented to the defendant, B. M. Behrends, who then and there paid the said sum to the said Robertson, who now has it in his custody and possession, in the City of Juneau, Alaska, unexpended.

VII.

That the remainder of the sum so appropriated and authorized [3] to be paid by the said ordinance or resolution, to wit, the sum of Five Hundred ($500.00) Dollars, is yet in the custody of said Behrends, defendant, as City Treasurer, and that unless he is restrained by order of this court he will pay the same to the said R. E. Robertson on his drafts under said ordinance or resolution, and the Mayor and the City Clerk will, unless the City is restrained, draw a warrant and deliver it to said Robertson for that sum, under the terms and alleged authority of said ordinance or resolution.

VIII.

That the said R. E. Robertson, defendant, has not yet left the City of Juneau, upon the services so mentioned and described in said ordinance or resolution and in this complaint, and has not now expended any part of the same, but is now in the City of Juneau, Alaska, and before the Court in this cause, with the whole of said sum of Fifteen Hundred ($1,500.00) Dollars, so paid to him by the City of Juneau, and the defendant B. M. Behrends, Treasurer, in his possession unexpended.

IX.

That the Mayor and the members of the Common Council of the City of Juneau, Alaska, who passed said ordinance or resolution on January 18, 1924, as

aforesaid, are in collusion with the defendants Robertson and Behrends, and have refused to make any attempt to take any action whatever to prevent the use of the said Two Thousand ($2,000.00) Dollars, or to recover the said sum of Fifteen Hundred ($1,500.00) Dollars so now held by the defendant R. E. Robertson, as Trustee for the City of Juneau, and there is no public official in or representing the public in said City who will or has authority to do so; that plaintiff and all other taxpayers in the City of Juneau will receive and suffer irreparable injury and loss and damage from this unlawful appropriation of and expenditure of said public funds unless this court [4] shall restrain the expenditure of the same and cause it to be returned into the City Treasury; and plaintiff and such other taxpayers of said City of Juneau are wholly without any other remedy.

X.

That the ordinance or resolution and the action of the City Council in attempting to appropriate and expend the said sums or any part thereof for the purposes stated by said council and alleged in this complaint was and is *ultra vires* and void and not within the powers of the City or said council or any of the defendants in this action, and the payment of the said money to the defendant, R. E. Robertson, by the defendant B. M. Behrends, the City Treasurer, was and is in violation of law; that without this court shall by its order restrain the use of said money for the purposes stated, and by its mandatory injunction prevent the said Robert-

son from expending the same for the uses alleged the said moneys will be so expended and lost to said City to the great and irreparable damage of this plaintiff and other taxpayers of said City of Juneau.

WHEREFORE the plaintiff prays this Court to issue its order of injunction against the defendant B. M. Behrends, as Treasurer of the City of Juneau, Alaska, and restrain him from paying the said sum of Five Hundred ($500.00) Dollars, or any part thereof, so appropriated by said City Council for the uses mentioned in said ordinance or resolution to the said Robertson for such uses, or at all.

That the Court issue its order of injunction against the said R. E. Robertson and restrain him from expending the said sum of Fifteen Hundred ($1,500.00) Dollars, or any part thereof, now held by him as Trustee for the City of Juneau, Alaska, under the said pretended authority of said ordinance or resolution so passed [5] by said City Council, as such trustee or at all; and that he return the same into the City Treasury of said City of Juneau without expending any part thereof.

That the Court issue its order of injunction against the City of Juneau, and all its officers, agents, trustees, servants and employees, including the defendants in this cause, commanding them and each of them to refrain from doing any act or thing to expend or pay out any part or portion of the said Two Thousand ($2,000.00) Dollars for the uses and objects so set out in the said ordinance or resolution of January 18, 1924,

That the Court grant this taxpayer and plaintiff such other and further relief as to the Court may seem meet and equitable in the premises, and for his costs and disbursements of action.

WICKERSHAM & KEHOE,
GROVER C. WINN,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

Emery Valentine, being first duly sworn, deposes and says: I am the plaintiff named in the above and foregoing complaint as amended; that I have read the said amended complaint, know the contents thereof, and that the facts stated therein are true.

EMERY VALENTINE.

Subscribed and sworn to before me this 29th day of January, 1924.

[Notarial Seal] J. W. KEHOE,
Notary Public for Alaska.

My commission expires Sept. 15, 1925.

Copy received and service accepted this 29th day of Jan., 1924.

HELLENTHAL & HELLENTHAL,
For the City of Juneau and Treasurer.
R. E. ROBERTSON,
K.,
For Defendant Robertson.

Filed in the District Court, Territory of Alaska, First Division. Jan. 29, 1924. John H. Dunn, Clerk. By ————, Deputy. [6]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 2369–A.

EMERY VALENTINE, for Himself, and All Other Taxpayers of the City of Juneau, Alaska,

Plaintiff,

versus

R. E. ROBERTSON, B. M. BEHRENDS, as Treasurer of the City of Juneau, Alaska, and the CITY OF JUNEAU, ALASKA,

Defendants.

APPLICATION FOR TEMPORARY INJUNCTION.

Comes now the plaintiff, on his own behalf, and for all other taxpayers of the City of Juneau, Alaska, and moves this Honorable Court for an injunction to issue against the above-named defendants and each of them, restraining them and each of them from paying the sum of Two Thousand ($2,000.00) Dollars, or any part thereof, mentioned in the complaint of the plaintiff against said defendants filed in the above entitled court and cause, and the affidavit hereto attached as a part of this application, to the said R. E. Robertson, defendant herein, or to any one for him; and restraining the said R. E. Robertson from accepting or receiving the said money, or any part thereof, until the further order of this Court in the premises.

This application is based upon the attached affidavit of the plaintiff, Emery Valentine, upon the complaint in the above-entitled cause and court filed, and upon the bond in the sum of Five Hundred ($500.00) Dollars submitted herewith as a condition to the issuance of said restraining order or injunction.

Dated at Juneau, Alaska, this 28 day of January, 1924.

WICKERSHAM & KEHOE,
GROVER C. WINN,
Attorneys for Plaintiff.

Filed in the District Court, Territory of Alaska, First Division. Jan. 28, 1924. John H. Dunn, Clerk. By ————, Deputy. [7]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 2369–A.

EMERY VALENTINE, for Himself, and All Other Taxpayers of the City of Juneau, Alaska,

Plaintiff,

versus

R. E. ROBERTSON, B. M. BEHRENDS, as Treasurer of the City of Juneau, Alaska, and THE CITY OF JUNEAU, ALASKA,

Defendants.

AFFIDAVIT OF EMERY VALENTINE.

United States of America,
Territory of Alaska,—ss.

Emery Valentine, being first duly sworn, deposes and says: I am a citizen of the United States, a resident and property owner of the city of Juneau, First Division, Territory of Alaska, and a taxpayer therein; that affiant is now and at all times herein mentioned was the owner of property, both real and personal, in the said city of Juneau, Alaska, and has paid the said city at all times his taxes on said property.

That on the 18th day of January, 1924, the Common Council of the city of Juneau, Alaska, in regular session passed an ordinance or resolution by the unanimous vote of the said city council, with the exception of H. R. Shepard who was then absent, appropriating the sum of Two Thousand ($2,000.00) Dollars out of the public moneys belonging to the said city in the treasury thereof raised from municipal taxation in said city upon the real and personal property therein, including the property of the affiant, subject to taxation for municipal purposes, and directing that said sum be paid by said municipal treasurer to the defendant, R. E. Robertson for the use of said R. E. Robertson in paying therefrom his traveling and subsistence and other expenses on a trip from Juneau, Alaska, to Washington, D. C., and other places, and return, for the purpose of lobbying for the division of the Territory of Alaska, by Con-

gress, and for the dredging of Gastineau Channel, the digging of Oliver Inlet Canal, digging Hawk Inlet Canal, dredging Wrangell Narrows, retention of the Army Post at Chilkoot Barracks, Alaska, and other similar lobby work, for other interested persons, corporations and communities in the Territory of Alaska.

That affiant is informed and believes and therefore so states that subsequent to the passage of said ordinance or resolution by said city council, the mayor of said city of Juneau, Alaska, drew an order for the sum of Fifteen Hundred ($1500.00) Dollars to be deducted from said sum of Two Thousand ($2,000.00) Dollars so appropriated which was countersigned by the city clerk of said city, ordering and authorizing the said B. M. Behrends, defendant, the treasurer of said city, to pay to said R. E. Robertson, defendant, the sum of Fifteen Hundred ($1500.00) Dollars. [8]

Affiant is informed and believes and therefore states that unless this Court grants the injunction prayed for in the complaint herein that the said officers of the said Common Council of the City of Juneau, Alaska, will pay over to the said R. E. Robertson, defendant, for the purposes hereinabove set forth the sum of Fifteen Hundred Dollars, and the remaining sum of Five Hundred Dollars, or part thereof, and that the said R. E. Robertson, defendant, will thereupon leave the City of Juneau, Alaska, and the jurisdiction of this court.

That unless the injunction prayed for in this action is granted by this Court this affiant and all other taxpayers of the City of Juneau, Alaska, will lose said sum of Two Thousand Dollars, and will suffer injury and irreparable loss by reason thereof.

EMERY VALENTINE,
Affiant.

Subscribed and sworn to before me this 27th day of January, 1924.

[Notarial Seal] JAMES WICKERSHAM,
Notary Public for Alaska.

My commission expires Sept. 15, 1925.

Filed in the District Court, Territory of Alaska, First Division. Jan. 28, 1924. John H. Dunn, Clerk. By N. B. Cook, Deputy. [9]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 2369–A.

EMERY VALENTINE, for Himself, and All Other Taxpayers of the City of Juneau, Alaska,
Plaintiff,

versus

R. E. ROBERTSON, B. M. BEHRENDS, as Treasurer of the City of Juneau, Alaska, and THE CITY OF JUNEAU, ALASKA,
Defendants.

TEMPORARY RESTRAINING ORDER.

This cause coming on to be heard before the Court on this 28th day of January, 1924, on the complaint and affidavit of the plaintiff, and his application for temporary restraining order, and the Court having read the complaint and affidavit, and being fully advised thereby,

IT IS NOW ORDERED,

That a temporary restraining order herein be issued as prayed for in the said complaint, and the defendants, and each of them, be and they are hereby restrained from paying the said sum of Two Thousand ($2,000.00) Dollars, or any part thereof, mentioned in said complaint and affidavit, to the said R. E. Robertson, or to any one for him, or at all; and the said R. E. Robertson is hereby restrained from accepting or receiving the said money, or any part thereof, until the further order of this Court herein; that this restraining order shall take effect upon the filing by the plaintiff of a bond as provided by law in such cases in the sum of Five Hundred ($500.00) Dollars, and that the Court will hear the defendant, or either of them, in opposition to the further continuance of this restraining order at 2:00 o'clock in the afternoon of this 28th day of January, 1924, or at any [10] time thereafter on one day's notice by the defendants; that a copy of this order with a copy of the complaint, summons, and the application for the injunction or restraining order herein be served on the defendants with the copy of the restraining order before said hour of 2 o'clock to-day.

Dated this 28th day of January, 1924.

THOS. M. REED,
District Judge.

Entered Court Journal No. S, page 355.

Filed in the District Court, Territory of Alaska, First Division. Jan. 28, 1924. John H. Dunn, Clerk. By ————, Deputy. [11]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 2369–A.

EMERY VALENTINE, for Himself, and for all Other Taxpayers of the City of Juneau, Alaska,

Plaintiff,

versus

R. E. ROBERTSON, B. M. BEHRENDS, as Treasurer of the City of Juneau, Alaska, and the CITY OF JUNEAU, ALASKA,

Defendants.

AMENDED RESTRAINING ORDER.

The above-entitled cause having come on to be heard of the 28th day of January, 1924, upon the complaint of the plaintiff together with an application for an injunction supported by the affidavit of the plaintiff, against the defendants and each of them, restraining them from paying the sum of Two Thousand ($2,000.00) Dollars or any part thereof, appropriated by the Common Council of the City of

Juneau, Alaska, for the purposes set forth in the complaint of the plaintiff herein, to R. E. Robertson, and restraining R. E. Robertson, defendant, from receiving or accepting the said sum or any part thereof; and it now appearing to the Court that the plaintiff herein has this day filed in this court and cause an amended complaint in the above-entitled cause wherein it appears that the sum of Fifteen Hundred ($1,500.00) Dollars of the Two Thousand ($2,000.00) Dollars so appropriated by said Common Council of the City of Juneau, as in the original and amended complaint set forth, has been paid to said R. E. Robertson, defendant, by the Mayor and City Clerk of Juneau, and presented to the Treasurer, B. M. Behrends, defendant, and by him paid, and that said sum of Fifteen Hundred ($1,500.00) Dollars is now in the custody and possession of R. E. Robertson, [12] defendant, and is unexpended by him, and praying, among other things that said R. E. Robertson, defendant, be restrained from using said sum of money so in his possession, or any part thereof, for the purposes so set forth in said complaints.

NOW, THEREFORE, it is hereby ORDERED, that the restraining order heretofore issued by this Court in this cause on the 28th of January, 1924, is hereby continued in full force and effect until the further order of this Court; and,

It is further ORDERED, that the defendant R. E. Robertson be and he is hereby restrained from expending said sum of money, to wit: Fifteen Hundred ($1,500.00) Dollars, or any part thereof, now

held by him under the ordinance or resolution of the City of Juneau, of January 18, 1924; and,

It is further ORDERED, that the City of Juneau, and all its officers, agents, trustees, servants and employees, including the defendants in this cause, be and they are hereby restrained from doing any act or thing to expend or pay out any part or portion of said Two Thousand ($2,000.00) Dollars for the uses and objects so set forth in the ordinance or resolution of the City of Juneau, Alaska, passed by the Common Council thereof on said 18th of January, 1924.

Dated this 30 day of January, 1924.

THOS. M. REED,
District Judge.

Entered Court Journal No. S, page 359.

Filed in the District Court, Territory of Alaska, First Division. Jan. 30, 1924. John H. Dunn, Clerk. By V. F. Pugh, Deputy. [13]

In the District Court for the District of Alaska, Division Number One, at Juneau.

CASE No. 2369–A.

EMERY VALENTINE, for Himself, and for all Other Taxpayers of the City of Juneau, Alaska,

Plaintiff,

vs.

R. E. ROBERTSON, B. M. BEHRENDS, as Treasurer of the City of Juneau, Alaska, and the CITY OF JUNEAU, ALASKA,

Defendants.

DEMURRER.

Come now the defendants and demur to the amended complaint herein for the reason that the same does not state facts sufficient to constitute a cause of action; and especially demur on behalf of the defendant, R. E. Robertson, on the grounds that the amended complaint does not state a cause of action as to him.

HELLENTHAL & HELLENTHAL,
R. E. ROBERTSON,
Attorneys for the Defendants.

Copies received Feb. 2, 1924.

WICKERSHAM & KEHOE,
GROVER C. WINN,
Attorneys for Plaintiff.

Filed in the District Court, Territory of Alaska, First Division. Feb. 2, 1924. John H. Dunn, Clerk. By W. B. King, Deputy. [14]

In the District Court for the District of Alaska, Division Number One, at Juneau.

CASE No. 2369–A.

EMERY VALENTINE, for Himself and all Other Taxpayers of the City of Juneau, Alaska,
Plaintiff,

vs.

R. E. ROBERTSON, B. M. BEHRENDS, as Treasurer of the City of Juneau, Alaska, and the CITY OF JUNEAU, ALASKA,
Defendants.

MOTION TO DISSOLVE RESTRAINING ORDERS.

Come now the defendants and having filed their answer to the amended complaint herein move that the restraining orders heretofore issued in the above-entitled cause on the 28th day of January, 1914, and the 30th day of January, 1924, be dissolved for the reasons set forth in the answer herein, which answer is hereby referred to and made a part hereof.

HELLENTHAL & HELLENTHAL,
R. E. ROBERTSON,
Attorneys for the Defendants.

United States of America,
Territory of Alaska,—ss.

Isadore Goldstein, being first duly sworn on oath, deposes and says: That he is the Mayor of the City of Juneau; that he has read the answer referred to in the foregoing motion and knows the contents thereof, and that the same is true as he verily believes.

I. GOLDSTEIN.

Subscribed and sworn to before me this second day of February, 1924.

[Notarial Seal] SIMON HELLENTHAL,
Notary Public for Alaska.

My commission expires Jan. 12, 1924.

Copies received Feb. 2, 1924.

WICKERSHAM & KEHOE,
GROVER C. WINN,
Attorneys for Plaintiff.

Filed in the District Court, Territory of Alaksa, First Division. Feb. 2, 1924. John H. Dunn, Clerk. By W. B. King, Deputy. [15]

In the District Court for the District of Alaska, Division Number One, at Juneau.

CASE No. 2369–A.

EMERY VALENTINE, for Himself and All Other Taxpayers of the City of Juneau, Alaska,
Plaintiff,

vs.

R. E. ROBERTSON, B. M. BEHRENDS, as Treasurer of the City of Juneau, Alaska, and the City of Juneau, Alaska,
Defendants.

ANSWER TO AMENDED COMPLAINT.

Come now the defendants and for answer to the amended complaint herein, admit, deny, and allege:

I.

For answer to paragraph one of said amended complaint, the defendants almit that the plaintiff is a citizen of the United States, a resident of the city of Juneau, Alaska, and the owner of a large amount of real and personal property, and a taxpayer of the city of Juneau, Alaska, and that he has during the period therein mentioned paid a large sum in taxes on his said property in Juneau, Alaska; but deny that a large sum, or any sum

whatsoever of the monies in the city treasury in Juneau, Alaska, was and is the very money so paid by the plaintiff into the said city treasury.

II.

For answer to parargraph two of said amended complaint, the defendants admit the allegations therein contained.

III.

For answer to paragraph three of said amended complaint, the defendants admit that on the eighteenth day of January, 1924, at the place therein stated the Common Council of the city of Juneau, Alaska, met in regular session, as therein stated, and [16] then and there passed a resolution by the unanimous vote of all the members of said council, excepting H. R. Shepard who was absent, appropriating the sum of Two Thousand ($2,000.00) Dollars of public money of the treasury of and belonging to the said city; but deny that said money so appropriated was raised exclusively by the said city by general municipal taxation in the said city, upon all the real and personal property therein, deny that said ordinance, or resolution, directed said sum to be paid to a competent person to be selected by the common council of the city of Juneau, Alaska, to compensate him and to defray his expenses to Washington, D. C., there and return, and to engage him while there to lobby before the Congress of the United States and to present before Congress and other public authorities the following:

The division of Alaska into two territories;
The erection of a public dock at Juneau, Alaska;
The erection of a Government building at Juneau, Alaska;
The dredging of Gastineau Channel, near Juneau, Alaska;
The digging of Hawk Inlet Canal;
The digging of Oliver Inlet Canal;
The establishment of a mail route on the north shore of Chichagof Island in southeastern Alaska;
The establishment of a land office in Juneau, Alaska;
The dredging of Wrangell Narrows in southeastern Alaska;

and deny the whole and every part thereof, except as stated in the affirmative answer herein.

IV.

For answer to parargraph four of said amended complaint, the defendants admit that on the eighteenth day of January, 1924, at the said meeting of the Common Council of the city of Juneau, Alaska, and after the passage of the ordinance, or resolution, the said Common Council by unanimous vote of all its members present, only excepting H. R. Shepard who was absent, selected, empowered and employed the defendant, R. E. Robertson, as their delegate to go to the city of Washington, D. C.; but deny that the ordinance, or resolution, therein referred to, was as stated in the aforesaid [17] paragraph; and deny that said

R. E. Robertson was employed by the city of Juneau to perform the various acts of lobbying for the enactment of legislation by Congress to procure the division of said Territory of Alaska, as set forth in said amended complaint; but admit that said R. E. Robertson was employed as set forth in the resolution herein set forth.

V.

For answer to paragraph five of the said amended complaint, the defendants admit the allegations therein contained.

VI.

For answer to paragraph six of the said amended complaint, the defendants deny that R. E. Robertson accepted the employment to act as such lobbyist, as set forth in the amended complaint; and deny that said R. E. Robertson agreed to act in any manner different from the manner set forth in the affirmative answer; and admit that said R. E. Robertson agreed to make the trip to Washington, D. C., as hereinafter set forth and that thereafter a warrant was signed by the mayor of the city of Juneau, Alaska, countersigned by the clerk, which said warrant was presented to B. M. Behrends, the treasurer, and paid by B. M. Behrends, as in said paragraph alleged; but deny that said R. E. Robertson now has the money referred to in said paragraph in his custody and possession; and in this connection admit that said R. E. Robertson now has the sum of Fifteen Hundred ($1500.00) Dollars in his account in the B. M. Behrends Bank,

in the city of Juneau, Alaska, and that it is unexpended.

VII.

For answer to paragraph seven of the said amended complaint, the defendants admit the allegations therein contained.

VIII.

For answer to paragraph eight of said amended complaint, [18] these defendants admit the same, except that they deny that the specific money paid to R. E. Robertson, by B. M. Behrends, as therein alleged, is still in his possession.

IX.

For answer to paragraph nine of said amended complaint, the defendants deny each and every allegation in said paragraph.

X.

For answer to paragraph ten of said amended complaint, the defendants deny each and every allegation therein contained.

AND FOR FURTHER ANSWER and by way of new matter, these defendants aver:

I.

That the city of Juneau is a municipal corporation, incorporated under the laws of the Territory of Alaska; and that Isadore Goldstein is the duly elected and qualified mayor of the city of Juneau, Alaska: and that J. J. Connors, J. L. Gray, A. F. McKinnon, William Reck, Thomas Judson, and H. R. Shepard are the duly and regularly elected councilmen of the city of Juneau, Alaska; and

that the defendant, R. E. Robertson, is the acting city attorney.

II.

That the city of Juneau is the commercial center for the northern part of southeastern Alaska, through which city considerable business is carried on with the outlying towns and camps; that in connection with said business the city of Juneau built a city wharf, as it was authorized to do and spent a large amount of money equipping said wharf with facilities for conducting said wharfage business; that the improvement of and aids to navigation greatly increased the business done by the city on its [19] said wharf.

III.

That the city of Juneau is the owner of all the streets within the municipality and it is the city's duty to keep said streets in repair; that for a long time past the city of Juneau has built its streets out of three-inch planking; that it has become impracticable, owing to the large number of automobiles in use in said city and to the rise of labor and material, to continue the method heretofore employed in building and improving streets; that permanent streets now have to be built necessitating the expenditure of a large amount of money, which the city of Juneau is unable to do unless it is authorized and empowered to issue bonds for said purpose; that it is necessary among other things, before it can issue said bonds, to have an act of Congress authorizing the issuance of said bonds; that a bill has been prepared and introduced into

the Congress of the United States by the delegate from Alaska, which bill, if it becomes a law, will give the city of Juneau said authority; that it is necessary, in order to secure the passage of said bill, to have a person who is conversant with the facts appear before the committees of Congress to explain the facts to said committees and work in conjunction with the delegate from Alaska to secure the passage of said bill authorizing said issuance of bonds.

IV.

That the citizens of Juneau, Alaska, and the citizens of southeastern Alaska, generally, had prior to the eighteenth day of January, 1924, been advocating the sending of persons to Washington, D. C., among which persons so mentioned a number of citizens had chosen R. E. Robertson, a person well qualified [20] and in possession of all the facts necessary to represent said citizens in Washington, D. C., and advocate certain legislation in connection with certain projects hereinafter enumerated in the resolution passed by the city council for the city of Juneau, on January 18, 1924.

V.

That the city of Juneau was interested in many of the projects advocated by the citizens of the community and enumerated in the resolution hereinbefore referred to, a copy of which is attached hereto, that the consummation of many of said projects would be of great benefit to the City of Juneau, generally, and particularly in connection with the city's ownership of its wharf and facilities;

that considering said benefits, the city council endorsed the various projects above referred to.

VI.

That the citizens of the City of Juneau and the community surrounding Juneau had made arrangements with R. E. Robertson for him to proceed to Washington, D. C., and for him to use his best endeavors to forward the passage of legislation advancing the aforesaid projects, at which time the said R. E. Robertson consented to act for the City of Juneau in connection with the passage of the bill allowing the said City of Juneau to issue bonds for street improvement and to use his best endeavors before the committees of Congress by explaining the facts to them and the needs of the City of Juneau in this connection, if the City of Juneau would appropriate sufficient money to pay his expenses in going to Washington.

VII.

That on the eighteenth day of January, 1924, the Common Council of the City of Juneau, Alaska, passed a resolution setting [21] forth the attitude of the City in regard to said several projects and appropriating Two Thousand ($2,000.00) Dollars in order to defray the expenses of R. E. Robertson to Washington, D. C., which money so appropriated or so much thereof as was necessary, was to be used by said Robertson in paying his expenses to Washington while there and return in representing the City in connection with the bill authorizing the City of Juneau to issue bonds for street

improvement purposes, a copy of which resolution is attached hereto, marked Exhibit "A," and made a part hereof.

VIII.

That the City of Juneau derives its revenue from taxing the real and personal property situate within said municipality from revenue and profit made by its city dock and facilities from license taxes and police fines imposed by it and receives the license taxes collected by the Federal Government for business conducted in the municipality; that the money in the City Treasury, prior to January 18, 1924, as well as the monies now in the City Treasury were derived from said sources; that the appropriation of and the paying out of the monies by the said City under the resolution attached hereto was done from monies in the Treasury of said City of Juneau, derived from the various sources aforesaid, which monies had not heretofore been appropriated or set aside for any purposes whatsoever, and will not necessitate the City of Juneau to levy a special tax and will not increase the tax levy for the current year.

IX.

That on the nineteenth day of January, 1924, pursuant to the resolution above-referred to, the Mayor of Juneau, Alaska, duly and regularly issued a warrant in favor of R. E. Robertson, in the sum of Fifteen Hundred ($1500.00) Dollars, which warrant was countersigned by the City Clerk and drawn on the City [22] Treasurer, B. M. Behrends; and on the twenty-first day of January, 1924,

B. M. Behrends, Treasurer, duly and regularly paid R. E. Robertson the $1500.00 represented by said warrant.

WHEREFORE these defendants pray that the complaint herein be dismissed and that they be allowed their costs and disbursements herein incurred.

HELLENTHAL & HELLENTHAL,
R. E. ROBERTSON,
Attorneys for the Defendants.
Business Address: Juneau, Alaska.

United States of America,
Territory of Alaska,—ss.

Isadore Goldstein, being first duly sworn, on oath deposes and says: That he is the duly elected and qualified Mayor of the City of Juneau, and is acting as such in making this verification; that he has read the foregoing answer to the amended complaint, and knows the contents thereof; and that the same is true as he verily believes.

I. GOLDSTEIN.

Subscribed and sworn to before me this second day of February, 1924.

[Notarial Seal] SIMON HELLENTHAL,
Notary Public for Alaska.

My commission expires Jan. 12, 1926.

Copies received Feb. 2, 1924.

WICKERSHAM & KEHOE,
GROVER C. WINN,
Attorneys for Plaintiff.

Filed in the District Court, Territory of Alaska, First Division. Feb. 2, 1924. John H. Dunn, Clerk. By W. B. King, Deputy. [23]

EXHIBIT "A."

A special Meeting of the Common Council was held in the City Hall on January 29, 1924, at 7:30 o'clock P. M., called for the purpose of correcting the minutes of the regular meeting held January 18, 1924.

Present:	Absent:
J. J. Connors,	(None)
J. Latimier Gray,	
A. F. McKinnon,	
T. B. Judson,	
Wm. J. Reck,	
H. R. Shepard.	

Councilman Connors moved that whereas the records of the Common Council of the regular meeting held January 18, 1924, state the resolutions passed as follows:

"Councilman Connors introduced the following resolution endorsing the following projects:

Division of the Territory of Alaska;
Erecting of a Government Dock at Juneau;
Erection of a Government building at Juneau;
Dredging of Gastineau Channel at Juneau;
Digging Hawk Inlet Canal;
Digging Oliver Inlet Canal;
Establishing a mail route on north shore of Chichagof Island;
Establishing a Land Office at Juneau; and the Dredging of Wrangell Narrows:

and recommend that a competent person be selected by the Common Council of the City of Juneau, to personally present these projects to the United States Congress and to work in conjunction with the Delegate from Alaska for the passage by Congress of bills covering appropriations for the above projects, and resolve that sufficient funds be appropriated out of the municipal treasury, and not exceeding Two Thousand ($2,000.00) Dollars for the purpose of paying the expenses necessary to send the above mentioned person to Washington, D. C. Whereupon Councilman Connors moved, and Councilman McKinnon seconded, that resolution as read by the Clerk be passed and approved and that a warrant be drawn for the sum of Fifteen Hundred ($1500.00) Dollars on the City Treasurer in favor of the delegate, and that he would be privileged if found necessary to draw on the City Treasury for an additional Five Hundred ($500.00) Dollars, and upon call of the roll, upon the adoption of the motion all councilmen present voted 'Yea,' and the motion was declared carried.

* * * * * * * * *

Recommended that the Clerk send copies of the [24] resolution to all incorporated towns in S. E. Alaska adding to the resolution that the Delegate so sent to Washington would work against the proposed abandonment of Chilkooot Barracks.

Councilman Gray moved and Councilman Connors seconded that Mr. R. E. Robertson of Juneau, Alaska, be selected to represent Juneau at Washington, D. C., in the matters of the foregoing resolu-

tion, and upon call of the roll and upon the adoption of the motion all councilmen voted 'Yea,' and the motion was declared carried."

AND WHEREAS said resolutions as placed upon the minutes are indefinite, inaccurate, uncertain, omit an important part, and fail to correctly state the proceedings of the Common Council, it is moved by Councilman Connors that the resolutions be corrected to read as follows:

That whereas the City of Juneau is the owner of a valuable wharf property built and equipped at the expense of many thousands of dollars; and whereas the consummation of the project hereinafter referred to will bring business to its said city wharf and add greatly to its value and directly effect the proprietary interest of the City of Juneau to said wharf property and wharfage business, and will result in great benefit to the community generally.

BE IT RESOLVED that the Common Council endorse the projects referred to in the written resolutions, to wit:

Division of the Territory of Alaska;
Erection of a Government dock at Juneau;
Erection of a Government building at Juneau;
Dredging of Gastineau Channel at Juneau;
Digging Hawk Inlet Canal;
Digging Oliver Inlet Canal;
Establishing a mail route on the North shore of Chichagof Island;
Establishing a Land Office at Juneau, Alaska;
Dredging of Wrangell Narrows; [25]

All of which are set forth in said resolutions, the part of which relating to the following is in words and figures, as follows, to wit:

"Whereas, on November 6th, 1923, at a special election held for the purpose of getting the expression of the voters relating to the Division of the Territory of Alaska, the voters of Juneau overwhelmingly expressed themselves in favor of such a division, and, further, that on the 15th day of November, 1923, a convention of delegates appointed by the Common Councils of the different municipalities of Southeastern Alaska drew up a Memorial petitioning the United States Congress to create a separate Territory of the First Judicial Division of Alaska, and also drew up a proposed Organic Act to be presented to Congress with the Memorial, And,

Whereas, The First Judicial Division of Alaska is without a United States Land Office and the need of a land office at Juneau, the Capital of Alaska, is becoming more apparent each day, And,

Whereas, The increased need and work for government vessels in Southeastern Alaskan waters has made it necessary for the Government to consider the erection of a Government Dock in Southeastern Alaska, and further, the geographical location of Juneau makes it the logical place for the erection of such a dock, and further, the Common Council of the City of Juneau feel that the erection of a government dock at Juneau, Alaska, is absolutely necessary for the docking and opera-

tion of government vessels operating in Southeastern Alaskan waters, And,

Whereas, the property owners, merchants and citizens of the City of Juneau acting on the Government's promise to erect a Government Building in the City of Juneau, have expended thousands of dollars in an endeavor to make Juneau a Capital City, by building homes, buildings and civic improvements, feel that in justice to them the Government should fulfill its promise and make available additional appropriations for the speedy erection of this building, the site of which has been partly donated by the citizens of Juneau, And,

Whereas, At the present time vessels leaving Juneau en route for the Westward, Skagway, and Chatham Straits points are required to take a course down Gastineau Channel and around Douglas Island a dangerous and hazardous route, a route in which many times of the year boats are required to put into harbors on account of storms especially while crossing the Taku. This route could and ought to be eliminated by the dredging of the North end of Gastineau Channel through to Stevens Passage. By so doing, navigation would not only be aided, but the distance between Juneau and Chatham Straits points would be shortened about twenty-five miles, And [26]

Whereas, Vessels at the present time en route from the Ocean and Chatham Straits points to Juneau must take a course North of Lynn Canal and around Point Retreat which is the Northerly end of Admiralty Island, and further this route is

unpassable many times of the year and especially in winter on account of the severe North winds which prevail, and further, this route could and ought to be eliminated by dredging a canal from Hawk Inlet to Stevens Passage, and by so doing vessels would at all times of the year be able to travel between Juneau and Chatham Straits points and would shorten the distance from Juneau to Chatham and Icy Straits points about fifty miles, And,

Whereas, A Canal connecting Stevens Passage with Oliver's Inlet is at the present time a great necessity owing to the increased towing business which is conducted by this section, the main source of supply being taken from Oliver Inlet section and to reach Juneau, boats must come North through Stevens passage and across Taku Inlet, a route dangerous and hazardous, And,

Whereas, That section of Icey Straits and Cross Sound and extending through Lisianski Straits South to Sitka is not on any mail route and depend upon an accommodating boat to take their mail to them, and further, the mining industries and canneries operating in that section are bringing to that section an increased population most of which is becoming permanent, the Common Council feel that a mail route taking in the above points and working separately from that route which takes in Chatham Straits and the South side of Chichagof Island and thus giving Sitka two mails a week and which would put Lisianski, Pinta Bay, Hirsh,

Chichagof, Port Altrop and other points on a mail route, should and ought to be created, And,

Whereas, Southeastern Alaska's main cut off, Wrangell Narrows, is inadequate for the larger vessels to pass through, making it necessary for them to take a route around Point Decision and up through Frederick Sound and by so doing they must eliminate Petersburg from their schedule in both the South bound and North bound trips, and lengthens the distance between Juneau and points South of Wrangell about one hundred miles. The Common Council of the City of Juneau feel that Wrangell Narrows should and ought to be dredged so that the larger vessels plying between the States and Southeastern Alaska points could pass through; thus putting Petersburg on their schedule, eliminate one hundred miles of dangerous waters and work a direct benefit to the people of all sections of Southeastern Alaska," And,

And the Common Council further endorse the movement started against the proposed abandonment of Chilkoot Barracks.

AND whereas it has become necessary to establish permanent streets in the City of Juneau and in order to do so it is necessary that an Act of Congress be passed allowing the City of Juneau to issue bonds in order to make said street improvements; [27]

AND whereas a bill has been introduced in the United States Congress looking towards said authorization; and whereas a local representative, familiar with the facts should be sent to Congress

to present the facts to the Committees of Congress and to work in conjunction with the Delegate from Alaska to secure the passage of this bill;

AND whereas the Citizens of the City of Juneau have taken a great interest in the matter hereinbefore endorsed and have been negotiating with R. E. Robertson, a person eminently fit and conversant with the above matters, with a view of sending him to Washington to present the above mentioned matters to the Committees of Congress; and whereas the City of Juneau is able to procure the services of said R. E. Robertson in connection with the Bill aforementioned looking towards the authorization of the Town of Juneau to issue bonds for street improvement without any further expense to the City of Juneau than the payment of said R. E. Robertson's expenses to Washington, D. C., which the City of Juneau is able to do from funds in the Treasury without levying a special tax for the purpose, and without increasing the tax levy for the current year.

BE IT RESOLVED that sufficient monies be appropriated out of the Municipal Treasury for the purpose of paying the expenses of the said R. E. Robertson in connection with his trip to Washington, D. C., not exceeding the sum of Two Thousand ($2,000.00) Dollars, and that a warrant be drawn in the sum of One Thousand Five Hundred ($1,500.00) Dollars on the City Treasury in favor of the said R. E. Robertson; and that he be privileged, if he find it necessary, to draw on the City Treasury for the additional sum of Five Hundred

($500.00) Dollars, which motion was seconded by Councilman McKinnon and upon the call of the roll upon the adoption of the motion, all councilmen present voted "Yea" and the motion was declared carried.

(Signed) WM. J. RECK,
Acting City Clerk.

(Signed) I. GOLDSTEIN,
Mayor. [28]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 2369–A.

EMERY VALENTINE, for Himself, and All Other Taxpayers of the City of Juneau Alaska,

Plaintiff,

vs.

R. E. ROBERTSON, B. M. BEHRENDS, as Treasurer of the City of Juneau, Alaska, and the CITY OF JUNEAU,

Defendants.

DEMURRER TO THE FURTHER AND AFFIRMATIVE ANSWER OF DEFENDANT.

Comes now the plaintiff, withdraws the former demurrer to the defendants amended answer, and now demurs to the further answer and affirmative matter therein stated in defendants' answer to the plaintiff's amended complaint in the above-entitled cause, and for cause of demurrer thereto says that

it appears upon the face thereof that the same does not state facts sufficient to constitute any defense or counterclaim to the said amended complaint of the plaintiff herein.

Dated February 8th, 1924.

WICKERSHAM & KEHOE,
GROVER C. WINN,
Attorneys for Plaintiff.

Copy received and service accepted this 8 day of February, 1924.

HELLENTHAL & HELLENTHAL,
Of Counsel for Defendants.

Filed in the District Court, Territory of Alaska, First Division. Feb. 8, 1924. John H. Dunn, Clerk. By W. B. King, Deputy. [29]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 2369–A.

EMERY VALENTINE,
Plaintiff,

vs.

THE CITY OF JUNEAU et al.,
Defendants.

ORDER OVERRULING DEMURRERS.

This matter having heretofore on Wednesday, February 6, 1924, come regularly on for hearing on the defendants' demurrer to the plaintiff's amended complaint and on the plaintiff's demurrer

to the defendants' answer and particularly the affirmative defenses therein contained, and argument having thereupon been submitted by counsel for the respective parties, and the court having thereupon taken the said matter under advisement and now being fully advised in the premises:

NOW, therefore, it is hereby ordered that defendants' demurrer to plaintiff's amended complaint be and the same is hereby overruled and the defendants are hereby allowed an exception thereto, and

It is hereby further ordered that plaintiff's demurrer to defendants' said answer and the affirmative defense therein contained be and the same is hereby overruled and the plaintiff is hereby allowed an exception thereto, and the plaintiff is further allowed until Monday, February 11, 1924, in which to file his reply to said answer.

Done in open court this 9th day of February, 1924.

THOS. M. REED,
District Judge.

Entered Court Journal No. S, page 382.

Filed in the District Court, Territory of Alaska, First Division. Feb. 9, 1924. John H. Dunn, Clerk. By W. B. King, Deputy. [30]

In the District Court for the Territory of Alaska, Division Numbered One, at Juneau.

No. 2369–A.

EMERY VALENTINE, for Himself and Other Taxpayers of the City of Juneau, Alaska, Plaintiff,

vs.

R. E. ROBERTSON, B. M. BEHRENDS, as Treasurer of the City of Juneau, Alaska, and the CITY OF JUNEAU, ALASKA, Defendants.

MEMORANDUM OPINION ON DEMURRERS.

This action is before me on demurrers filed by the defendants against the amended complaint of plaintiff; and also a demurrer filed by the plaintiff to the affirmative answer of defendants, which affirmative answer was filed at the same time as defendants' demurrer to the complaint. By stipulation of counsel the demurrers were argued before the Court at the same time. In order to get a full understanding of the litigation, it will be well to give a history of the same before considering the demurrers:

On January 28, 1924, Emory Valentine for himself and others taxpayers of the City of Juneau, brought this action to restrain B. M. Behrends as Treasurer of the City from paying out and R. E. Robertson, defendant, from receiving certain moneys alleged to have been appropriated by the City Coun-

cil of Juneau to pay the latter's traveling and subsistence expenses to Washington, D. C., and return, for the purpose of lobbying before Congress of the United States for the division of the Territory of Alaska, the digging of the Hawk Inlet Canal and the Oliver Inlet Canal, and other similar lobbying work for other interested persons, corporations and communities than Juneau, in the Territory of Alaska, plaintiff alleging that the appropriation of said money was *ultra vires,* in violation of law and beyond the power of the corporation. With the petition and affidavit, a motion for a restraining [31] order, *pendente lite,* was submitted. Upon consideration of the motion and affidavit, an order was issued by the Court restraining defendants as prayed for, subject to a motion to dissolve the same on one day's notice.

On January 29, an amended complaint was filed by the plaintiff, setting forth the appropriation by the City Council of Juneau of the sum of $2,000 to defray the expenses of a competent person in going to Washington, D. C., for the purpose of lobbying before Congress in furtherance of the projects aforesaid, and the selection of the defendant Robertson as such person on January 18, the drawing of a warrant in his favor for $1,500 and the payment thereof by B. M. Behrends, the City Treasurer,—the said sum of $1,500 to be used by defendant Robertson as aforesaid, and the balance of the appropriation of $2,000 being subject to his order when required; and the amended complaint further allege that all of which actions of the City

Council of Juneau were *ultra vires,* without authority of law and to the irreparable injury of the plaintiff and the other taxpayers represented by him; that the Common Council and the other defendants were in collusion and refused to take any action toward abrogating said contract or the recovery of the money paid, etc.

On reading the complaint, an amended temporary restraining order was thereupon issued, subject to dissolution on notice, which amended order continued the original restraining order in force but added provision that the defendant Robertson be restrained from expending the sum of $1,500 then in his hands for the purpose alleged, and restraining the City, its officers, and agents, and employees from paying out any further sum for the purposes aforesaid.

On February 2, the defendants appeared and filed a demurrer to the amended complaint and, at the same time, filed an answer under oath. The answer sets up an affirmative defense, and to this affirmative [32] defense the plaintiff has interposed a general demurrer. In each case, the demurrer attacks the legal sufficiency of the complaint and the sufficiency of the affirmative defense, respectively.

The demurrers came on for argument on February 4. In the argument no specific or general defect in the complaint was pointed out by the defendants. The argument was almost wholly directed to the sufficiency of the allegations of the affirmative answer. However, as the action depends on

the sufficiency of the complaint, and an attack on the sufficiency in law of an affirmative answer relates back to and involves the validity of the complaint, a discussion of the legal sufficiency of such answer necessarily involves the sufficiency of the complaint. I have therefore considered the sufficiency of the complaint as against the general demurrer of the defendants and am of the opinion that it states a good cause of action.

It alleges that the defendant is a taxpayer of the city of Juneau; that the defendant Behrends is treasurer and custodian of the public moneys of the city, that the Common Council appropriated the sum of $2,000 of the public moneys of the city to be paid to a competent person, to be by it selected, to compensate him and to defray his expenses to Washington, D. C., and return, to engage while there in lobbying before Congress and presenting to Congress the desirability of the division of the Territory of Alaska into two territories, the erection of a government dock and building at Juneau, the dredging of Gastineau Channel, near Juneau, the digging of canals at Hawk Inlet and Oliver Inlet, the establishment of certain mail routes, the dredging of Wrangell Narrows, and other proposed matters not pertaining strictly to municipal government purposes, and that the City Council had selected the defendant R. E. Robertson as a suitable person to do the acts of lobbying for the purposes stated and thereupon drew a warrant in favor of defendant Robertson for such purposes in the sum [33] of $1500, and that the

Treasurer paid out said sum to defendant Robertson who now has the same in his possession; that the remainder of said sum of $2,000 remains in the custody of the Treasurer subject to the order of the said Robertson, and that the Treasurer will pay the same out to the said Robertson upon the order of the Mayor and City Clerk, unless restrained. That the Mayor and City Council who passed the ordinance appropriating said sum are in collusion with the Treasurer Behrends, and refuse to take any action in the premises to recover said sum of money so paid out, or to prevent any further sum to be paid out by the said Behrends; that the appropriation for the purposes aforesaid are beyond the powers of the City Council, being *ultra vires* and void, and the same, and the payments made thereunder, were and are in violation of law.

There is no question but that a taxpayer may enjoin the payment of moneys from the municipal treasury where the same is about to be illegally appropriated by the municipal authorities. Public moneys in the treasury of a municipal corporation are held in trust by the municipal authorities for the benefit of all the inhabitants thereof. The City Council function as trustees and the citizens of the town are *cestui que trust;* and a resident taxpayer may invoke the action of the court to prevent the misappropriation of municipal funds, or the illegal creation of a debt by the corporate authorities.

See,

Crampton vs. Zalnski, 101 U. S. 14;
Russell vs. Tate, 13 S. W. 136;
McIntire vs. El Paso County, 61 Pac. 237;
Lundler vs. Milwaukee Elec. R. Co., 83 N. W. 851;
2 Dillon, Municipal Corporations, pp. 915–919 and notes;
3 McQuillin, Municipal Corporations, section 2575;
19 Ruling Case Law, page 1163. [34]

The purposes alleged in the complaint for which defendant Robertson's expenses to Washington, D. C., are being paid by the city, are not, in my opinion, a public municipal purpose for the reason that the same are all extraneous to the corporation. While they may be, in themselves, meritorious projects and for the public interest generally, yet they are not for the public municipal interest as defined by the authorities. There is a clear distinction between a general public interest in a matter and a municipal public interest.

If the prime measure or purpose of an appropriation is to subserve a public municipal purpose it is immaterial if private interests are incidentally advantageously affected thereby; and so, if a private or other public interest, not directly pertaining to the corporation or within the powers of the corporation, is the primary object of the appropriation, it is not a public municipal purpose within the law. No one would contend that an appropriation by the city of Juneau to dredge Wrangell

Narrows, or to dig the Hawk Inlet or Oliver Inlet Canals, or any of the other purposes alleged in the complaint as purposes of the appropriation for which Mr. Robertson is to go to Washington, would be valid as a public municipal purpose,—hence, the expenses of a person lobbying for such objects could not be said to be incurred to promote a governmental municipal purpose.

It is well settled that a municipal corporation has such powers and such only as (1st) are expressly granted; (2d) are fairly or necessarily implied from those granted; (3d) are essential to the declared objects or purposes of the incorporation.

As to the third, it is not enough that they be convenient, or general, or indirectly act for the advantage of the corporation. It must appear that they are indispensable to the purposes of the corporation and in case of doubt of the existence of the power of the corporation to make an appropriation, the same should be denied by the Court. If the project or purpose for an appropriation is made under [35] the pretense of actual authority but intended to promote some unauthorized purpose, the courts will declare it illegal. If the primary object of a public expenditure is to subserve a public municipal purpose, the expenditure is legal notwithstanding it also involves as an incident an expense which, standing alone, would not be lawful; but if the primary purpose of an appropriation is to promote some purpose not within any express or implied powers of a corporation, the expenditure would be illegal, even though it

may incidentally serve some public purpose. (See McQuillin on Municipal Corporations, vol. 5, paragraph 2165.)

But the affirmative defense to which the demurrer of plaintiff is addressed alleges a different state of facts. It is alleged, in substance, that R. E. Robertson is the acting city attorney of the city; that the city is operating a municipal wharf as an aid to navigation, which greatly increases the business of the inhabitants of the city; that the city of Juneau is the owner of the streets of the city and for a long time has maintained the streets by means of wooden planking at a great expense but because of the increased traffic and the cost of labor and materials, it has become impracticable so to maintain the streets and that permanent streets will have to be built, necessitating a large expenditure of money, which the city is unable to do unless empowered to issue bonds for such purpose; and it is necessary to have an authorization from Congress of the United States for the issuance of said bonds. That a bill for this purpose has been introduced and is now pending in the Congress of the United States which, when it becomes a law, will authorize the city to issue bonds for that purpose, but that it is necessary for a person conversant with the facts to present the same to committees in Congress and ask, in conjunction with the delegate, for the passage of such bill. That the citizens of Juneau and southeastern Alaska generally, have been advocating the sending of a person to Washington [36] to take up legislation in connection with the

projects enumerated in the complaint of plaintiff; that the consummation of such projects would be of benefit to the city, and particularly in connection with its wharf facilities. That the citizens of other near-by communities had arranged to send a competent person to Washington to advocate the passage of such projects. That Mr. Robertson consented to act for the city in connection with the street improvement bonds if the city would devote sufficient money to pay his expenses in going to Washington; that the said money was appropriated by the City Council to pay the reasonable expenses of the said Robertson in connection with securing passage of the bill for the issuance of the bonds for street improvement purposes.

As against the demurrer, the facts alleged in the complaint must be taken as true. Boiled down, it appears from the answer that Mr. R. E. Robertson is City Attorney and as such acts in a legal advisory capacity to the City Council; the answer further shows that it is necessary for the City Council to provide funds for the construction of permanent streets; that under the bill now pending in Congress, the city is authorized to bond itself for that purpose, and that the appropriation of the money, payment of which is sought to be enjoined hereby, is to pay his expenses in going to Washington, to lay before Congress the necessity for relief in that regard by the passage of the bill.

It cannot be denied that the improvement and construction of public streets of the city is one of its municipal functions,—one which the city is

bound, for the benefit of its inhabitants, to perform; and any act done toward that end comes strictly within a public municipal purpose. If, then, the primary purpose of the trip to Washington of Mr. Robertson is, the purpose of securing authority to the city to improve or construct streets for the benefit of all the inhabitants of the municipality and the appropriation was made so as to enable that purpose [37] to be accomplished, it would, in my opinion, be a legitimate municipal purpose and come within the power of the Common Council of the corporation.

But it is urged that the services Mr. Robertson is to perform are merely lobbying services and, as such, are against public policy and void, and that therefore the city is not empowered to expend any money for such purposes.

But not all contracts to expend moneys to persons to secure legislative action are void. Each case must depend upon the terms of the contract itself. The distinction is pointed out in Christ vs. Child, 21 Wallace, 441–445. The Supreme Court therein says that an agreement to take charge of a claim before Congress and to prosecute it as agent or attorney for claimant by lobby services is void, but that contracts for purely professional services, such as drafting petitions for an act, attending to the taking of testimony, preparing arguments and submitting them to the committee or other proper authority, and so forth, are valid. But there is in this case a sufficient showing that the contract for the services of Mr. Robertson is not void under

the authority of the Supreme Court. Mr. Robertson, according to the answer, is the acting city attorney and legal adviser of the city. He is not to receive any compensation, contingent or otherwise, for his services. He is not seeking to influence Congress for the private benefit of any person or class of persons. He will represent the municipal corporation for public municipal purposes. The nature of the relation and the power sought by the Common Council, as stated in the answer, is ample to repel the slightest suspicion of improper motives on their part or on the part of Mr. Robertson.

It, however, is urged, under the authority of Henderson et al., vs. the City of Covington, 14 Bush (Ky.), 313, that it is not within the corporate powers for the council to advance moneys for the purpose of [38] sending anyone to Washington to influence legislation, even though for municipal purposes. At first reading, this case would seem to hold squarely that it is not within the powers of the corporate council of the City of Covington to appropriate the revenues of the city to obtain an increase of the powers of the corporation through persons sent by the common council to appear before the state legislature and Congress. The city council of Covington sought to increase the powers of the city so as to authorize the city to build a bridge across the Ohio River from Covington, Kentucky, to Cincinnati, Ohio. A number of persons, not employees of the city, incurred expenses in going before the legislature and Congress for that purpose and sought reimbursement from

the city council. The Court therein found that to build a bridge across the Ohio River was not part of the duty of the common council of Covington, nor was the legislation sought necessary to enable it to perform its corporate duties or to accomplish the purpose for which the corporation was formed, and that while it would be of great advantage to the city to have the bridge built by inviting population, enhancing the value of real estate, and so forth, it was not within the power of the city to appropriate money for the objects sought, as they were not necessary for the performance of its duty to its inhabitants or to accomplish its corporate purposes.

There is a broad distinction, however, between that case and the case at bar. According to the findings of the Court, it was not necessary for the performance of the duty of the common council to its inhabitants or to accomplish its corporate purposes, to build the bridge between the city of Covington and the city of Cincinnati. If it was not within the corporate purposes to do so, then it was not within the powers of the common council of the city to appropriate moneys for any person to further that object. The appropriation also was sought by persons not members of the city council itself or employees of the city. [39] In the case at bar, according to the allegations of the complaint, it is necessary for the carrying out of the purposes of the corporation that the powers of the city be increased so as to afford safe and permanent public streets for the City of Juneau, that additional

legislation be had. Mr. Robertson is the representative of the city and the purpose of the city in sending Mr. Robertson to Washington is that he advance and assist in securing legislation for purely municipal purposes.

In Meehan et al. vs. Parsons et al., 271 Ill. 546, 111 N. E. Reporter, 529, a question similar to the question in this case was directly raised before the court. There a bill was filed to enjoin the city from paying the necessary expenses of its mayor in representing the city before Congress to obtain an appropriation from the federal government of moneys for levees and embankments in and about the city of Cairo. It was alleged in the bill that the services rendered and expenses incurred were for lobbying and that payment was illegal and unauthorized because the city had no power to pay out moneys for such purposes as not being within the corporate purposes of the city. In his answer, Parsons alleged that during the summer of 1912 he had attended the sessions of Congress in the city of Washington to lobby for and obtain, if possible, an appropriation of money for levees and embankments in and about the city of Cairo. He alleged that the work was done on behalf of the city of Cairo itself and at the instance and for the special benefit of said city; that his expenses were actual, reasonable and necessary, being incurred by him in the accomplishment of the work; that he had never at any time asked for or demanded any compensation from the city for his time and services and that it was necessary that

the levees of the city of Cairo be raised and strengthened, and that it was impracticable to provide such funds from the city treasury without assistance from the general government.

The contention was made that it was contrary to public policy [40] for the city to reimburse Parsons for expenses incurred in securing the passage of an appropriation for repairing and strengthening the levees at the city of Cairo. The Court says:

> Appellees cite a number of authorities under the propositions; first, that an agreement for compensation contingent upon obtaining legislation is void; second, that a contract to promote the passing of laws and ordinances and paying expenses or compensation therefor is against public policy and cannot be enforced. The first of these propositions is not applicable to the facts in this case, and the second proposition is not sustained by the authorities cited in support thereof. The cases cited by appellees do hold, and properly, that an agreement for compensation which is contingent upon obtaining certain legislation is void. No such situation is presented by the facts in this case. While appellants aver in their answer that Parsons attended upon the sessions of Congress in Washington at the instance of the city, it is nowhere alleged by appellees, or admitted by appellants that Parsons was to receive any compensation contingent upon obtaining the desired legislation. On the contrary, it does

definitely and clearly appear that Parsons is claiming only a portion of his proper, necessary, and suitable expenses incurred in connection with the three trips he made to the city of Washington, and that he had no personal interest whatever in the outcome, and that personally he would neither be benefited nor damaged by any action which Congress might take in the matter. The courts have not gone so far as to hold that in no event and under no circumstances is it proper to interview and importune members of a legislative body to enact certain legislation in which the party importuning them may be interested.

The interests of the city of Cairo would undoubtedly be affected by whatever action Congress should choose to take in reference to the appropriation for the building of its levees. Should Congress refuse to appropriate any sum whatever, the whole burden of building and maintaining its levees would rest upon the city. That burden would be lightened by whatever appropriation Congress should see fit to make. The city, therefore, had the undoubted right to authorize its chief executive to appear before the various congressional committees and interview the members of Congress to urge upon them the claims of the city and to advance any legitimate argument in favor of the passage of an appropriation bill for the relief of the city in this respect. Having the undoubted right to intercede with the members

of Congress and to appear before its committees through its authorized agent, it must follow that the city undoubtedly would have the right to pay the necessary and legitimate expenses of its agent in presenting its claims to the members of Congress.

In the case at bar, it is alleged by the answer that it is necessary for the city to construct permanent streets instead of the temporary plank streets which are now in the city; that the city is unable, from its current revenues or other revenues, to secure sufficient funds to construct such streets, and that it is necessary that legislation pending in Congress, authorizing the city to bond itself to erect and construct such streets should be passed. It further appears that [41] Mr. Robertson would not be benefited and that he has no special interest in the construction of the permanent streets, and the case is squarely within the clear and lucid reasoning of the last cited case of the Supreme Court of the State of Illinois. See, also:

In re Taxpayers and Freeholders, 50 N. Y. Sup. 357–366. Sun Printing & Pub. Ass'n, 157 N. Y. 257–265, 46 N. E. 499. Dillon, Municipal Corporations, 4th Ed., pars. 75–76. Roberts vs. State, 160 N. Y. 217, 54 Northeastern, 679.

The demurrer to the affirmative answer will therefore be overruled.

THOS. M. REED,
Judge.

Rendered Feb. 9, 1924.

Filed in the District Court, Territory of Alaska, First Division. Feb. 11, 1924. John H. Dunn, Clerk. By W. B. King, Deputy. [42]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 2369–A.

EMERY VALENTINE,

Plaintiff,

vs.

THE CITY OF JUNEAU, a Municipal Corporation, et al.,

Defendants.

JUDGMENT AND DECREE.

Now on this day this matter coming up regularly before the Court, the plaintiff appearing by his attorneys, Messrs. Wickersham and Kehoe, and the defendants appearing by their attorneys, Messrs. Hellenthal & Hellenthal and R. E. Robertson, Esq., and thereupon plaintiff by his said counsel announcing in open court that the plaintiff would stand upon his demurrer heretofore filed to the defendants' answer and affirmative defense therein contained and, further, that plaintiff would not plead over, and thereupon defendants by their attorneys presenting their motion in writing that the Court vacate and set aside the temporary restraining order and injunction entered herein and their oral motion that judgment and decree be entered in favor of the defendants,

Now, therefore, the Court now being fully advised in the premises, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the temporary restraining orders and injunctions heretofore entered herein against the defendants be and the same are hereby vacated and set aside, and IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff take nothing by his action and that defendants go hence without day and that defendants have and recover from the plaintiff their costs herein expended, to be taxed, to all of which plaintiff excepts and his exception is allowed.

Done in open court this 11th day of February, 1924.

THOS. M. REED,
District Judge.

Entered Court Journal No. S, page 389.

Filed in the District Court, Territory of Alaska, First Division. Feb. 11, 1924. John H. Dunn, Clerk. By W. B. King, Deputy. [43]

In the District Court for the District of Alaska, Division Number One, at Juneau.

IN EQUITY—No. 2369–A.

EMERY VALENTINE, for Himself, and All Other Taxpayers in the City of Juneau, Alaska,

Plaintiff and Appellant,

vs.

R. E. ROBERTSON, B. M. BEHRENDS, as Treasurer of the City of Juneau, Alaska, and the CITY OF JUNEAU, ALASKA,

Defendants and Appellees.

PETITION FOR APPEAL AND SUPERSEDEAS.

The above-named Emery Valentine, conceiving himself aggrieved by the decree made and entered on the 11th day of February, 1924, in the above-entitled court and cause, does hereby appeal from the said order and decree, to the United States Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in his assignment of errors, which is filed herewith, and he prays that such appeal be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and the plaintiff also desires that said appeal as aforesaid shall operate as a

supersedeas, and may continue in full force and effect the injunction heretofore made and entered of record in this cause during the pendency of the said appeal and until the final decision thereon by the said United States Circuit Court of Appeals, for the Ninth Circuit.

WHEREFORE petitioner prays that the said appeal may be allowed, and that upon his giving bond in an amount to be fixed by this court, the said appeal may operate as a *supersedeas* and may [44] continue in full force and effect the injunctions heretofore made and entered of record in this cause during the pendency of said appeal and until the final decision thereon by the said United States Circuit Court of Appeals for the Ninth Circuit.

And petitioner prays for all general and equitable relief.

EMERY VALENTINE,
Plaintiff and Appellant.
WICKERSHAM & KEHOE,
GROVER C. WINN,
Attorneys for Plaintiff and Appellant.

Service accepted and receipt acknowledged this 11th day of February, 1924.

HELLENTHAL & HELLENTHAL,
R. E. ROBERTSON,
Counsel for Defendants.

Filed in the District Court, Territory of Alaska, First Division. Feb. 11, 1924. John H. Dunn, Clerk. By ————, Deputy. [45]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 2369–A.

EMERY VALENTINE, for Himself, and All Other Taxpayers of the City of Juneau, Alaska,

Plaintiff and Appellant,

vs.

R. E. ROBERTSON, B. M. BEHRENDS, as Treasurer of the City of Juneau, Alaska, and the CITY OF JUNEAU, ALASKA,

Defendants and Appellees.

ASSIGNMENT OF ERRORS.

Now comes the plaintiff and appellant and assigns the following errors committed by the court in the trial of the above-entitled cause, and in the rendition of the decree therein:

I.

The Court erred in overruling the plaintiff's demurrer to the defendant's affirmative answer in their answer to the plaintiff's amended complaint.

II.

The Court erred in holding that the matter set up in defendant's answer constituted any defense to the allegations in plaintiff's amended complaint.

III.

The Court erred in holding that the Common Council of the City of Juneau, Alaska, had power or authority to adopt and pass the resolution of

January 18th, 1924, and (or) the amended resolution of January 29th, 1924, for the payment of the sums therein mentioned to defendant Robertson for the uses therein set forth,or at all.

IV.

The Court erred in holding that the treasurer of the City of Juneau, Alaska, or the City of Juneau, Alaska, had power and authority to make the payment of the sums mentioned in the said resolutions of [46] January 18th, and January 29th, 1924, or either of them, to the said Robertson, for the uses therein set forth.

V.

The Court erred in refusing to grant the prayer of the plaintiff's amended complaint.

VI.

The Court erred in dismissing the plaintiff's complaint and action and in rendering judgment for defendants and against the plaintiff herein.

And for the said errors and others apparent on the face of the record, the plaintiff prays that the decree of the District Court be reversed, and since the whole of the record is before the court, that the United States Circuit Court of Appeals, for the Ninth Circuit, enter such decree for the plaintiff as prayed for in his complaint, as amended, and such other relief as he is entitled to have on the admissions of the pleadings and record, for his costs and disbursements in this action below and on appeal, and for such other decrees and orders as to this court may seem just and proper.

Dated this 11th day of February, 1924.

WICKERSHAM & KEHOE,
GROVER C. WINN,
Attorneys for Plaintiff and Appellant.

Filed in the District Court, Territory of Alaska, First Division. Feb. 11, 1924. John H. Dunn, Clerk. By ————, Deputy. [47]

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In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 2369–A.

EMERY VALENTINE et al.,

Plaintiffs,

vs.

R. E. ROBERTSON et al.,

Defendants.

ORDER ALLOWING APPEAL AND DENYING SUPERSEDEAS.

On consideration of the petition for appeal and *supersedeas* filed this 11th day of February, 1924, in the above-entitled cause,—

IT IS HEREBY ORDERED, that the said appeal be and the same is hereby allowed, and that a transcript of the record in said cause, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and it is further ordered, that upon the application of the plaintiff and appellant for the allowance of a *supersedeas* and stay bond, the same be and it is

hereby denied by the court, to which denial the plaintiff and appellant excepts, and an exception is hereby allowed.

Dated this 11th day of February, 1924.

THOS. M. REED,
District Judge.

Copy received and service acknowledged this 11th day of February, 1924.

R. E. ROBERTSON,
For Defendant.

Filed in the District Court, Territory of Alaska, First Division. Feb. 11, 1924. John H. Dunn, Clerk. By W. B. King, Deputy.

Entered Court Journal No. S, page 389. [48]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 2369–A.

EMERY VALENTINE, for Himself, and All Other Taxpayers of the City of Juneau, Alaska,

Plaintiff and Appellant,

vs.

R. E. ROBERTSON, B. M. BEHRENDS, as Treasurer of the City of Juneau, Alaska, and the CITY OF JUNEAU, ALASKA,

Defendants and Appellees.

ORDER FIXING COST BOND ON APPEAL.

This cause coming on to be heard on petition for

appeal from the final order and decree of this Court against the plaintiff, the plaintiff and appellant moves the Court to fix the amount of a cost bond on said appeal,—

IT IS ORDERED, that the said cost bond to the opposite party be fixed in the sum of Two Hundred and Fifty Dollars, to answer all costs if he shall fail to sustain his appeal.

Dated this 11th day of February, 1924.

THOS. M. REED,
District Judge.

Service accepted and copy received this 11th day of February, 1924.

HELLENTHAL & HELLENTHAL,
Of Counsel for Defendants.

Filed in the District Court, Territory of Alaska, First Division. Feb. 11, 1924. John H. Dunn, Clerk. By ————, Deputy.

Entered Court Journal No. S, page 390. [49]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 2369–A.

EMERY VALENTINE, for Himself, and All Other Taxpayers in the City of Juneau, Alaska,

Plaintiff and Appellant,

vs.

R. E. ROBERTSON, B. M. BEHRENDS, as Treasurer of the City of Juneau, Alaska, and the CITY OF JUNEAU, ALASKA,

Defendants and Appellees.

COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, That we, Emery Valentine, as principal, and E. L. Pulver and Lockie McKinnon, as sureties, are held and firmly bound unto R. E. Robertson, B. M. Behrends, as Treasurer of the City of Juneau, Alaska, and the City of Juneau, Alaska, the defendants hereinabove named, in the full sum of Two Hundred and Fifty Dollars, to be paid to the said R. E. Robertson, B. M. Behrends, as Treasurer of the City of Juneau, Alaska, and the City of Juneau, Alaska, aforesaid, their said attorneys, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of February, 1924.

The condition of this obligation is such, however, that whereas the above-bounden Emery Valentine has taken an appeal in the above-entitled and numbered cause to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree rendered by the District Court aforesaid on the 11th day of February, 1924,

Now, if the said Emery Valentine shall prosecute his said [50] appeal to effect and answer and pay all such costs and damages as may be awarded against him if he shall fail to sustain his appeal and make his plea good, then this obligation shall

be null and void; otherwise to remain in full force and effect.

EMERY VALENTINE,
Principal.
E. L. PULVER,
LOCKIE McKINNON,
Sureties.

Territory of Alaska,
Juneau Precinct,—ss.

E. L. Pulver and Lockie McKinnon, being first duly sworn, each for himself, deposes and says; that he is one of the sureties whose name is signed to the above and foregoing bond, that he signed the same for the uses and purposes therein set forth; that he is a resident within the Territory of Alaska, but no counsellor or attorney at law, marshal, clerk, or other officer, of any court; that he is worth the sum specified in the undertaking, exclusive of property exempt from execution, and over and above all just debts and liabilities.

E. L. PULVER.
LOCKIE McKINNON.

Subscribed and sworn to before me this 11th day of February, 1924.

[Seal] J. W. KEHOE,
Notary Public for Alaska.

My commission expires Sept. 15, 1925.

Copy received and service accepted this 11th day of February, 1924.

HELLENTHAL & HELLENTHAL,
Of Counsel for Defendants.

Approved Feby. 11, 1924.

THOS. M. REED,
Judge.

Filed in the District Court, Territory of Alaska, First Division. Feb. 11, 1924. John H. Dunn, Clerk. By ————, Deputy. [51]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 2369–A.

EMERY VALENTINE, for Himself, and All Other Taxpayers of the City of Juneau, Alaska,

Plaintiff and Appellant,

vs.

R. E. ROBERTSON, B. M. BEHRENDS, as Treasurer of the City of Juneau, Alaska, and the CITY OF JUNEAU, ALASKA,

Defendants and Appellees.

CITATION ON APPEAL.

The President of the United States of America, to R. E. Robertson, B. M. Behrends, as Treasurer of the City of Juneau, Alaska, and the City of Juneau, Alaska, and to Their Attorneys of Record Herein, GREETING:

You and each of you are hereby cited and admonished to be and apear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, State of Cali-

fornia, within thirty days from the date hereof, pursuant to an appeal filed in the clerk's office for the District Court for the District of Alaska, Division Number One, at Juneau, Alaska, in a cause wherein Emery Valentine is appellant and you are the appellees, then and there to show cause, if any there be, why the decree mentiond in said appeal should not be corrected and speedy justice done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 11th day of February, 1924.

THOS. M. REED,
District Judge.

Copy received Feb. 11, 1924.
HELLENTHAL & HELLENTHAL.
R. E. ROBERTSON.

Filed in the District Court, Territory of Alaska, First Division. Feb. 11, 1924. John H. Dunn, Clerk. By ————, Deputy. [52]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 2369–A.

EMERY VALENTINE, for Himself, and All Other Taxpayers of the City of Juneau, Alaska,

Plaintiff and Appellant,

vs.

R. E. ROBERTSON, B. M. BEHRENDS, as Treasurer of the City of Juneau, Alaska, and the CITY OF JUNEAU, ALASKA,

Defendants and Appellees.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the District Court for Alaska, Division No. 1, Juneau, Alaska:

Sir: You will please make up a transcript of the record on appeal in the above-entitled and numbered cause, and include therein the following papers on file in your office or on the records thereof, to wit:

1. Plaintiff's amended complaint (and admission of service).
2. Application for a temporary injunction.
3. Affidavit for injunction by Valentine.
4. Temporary restraining order.
5. Amended restraining order.
6. Demurrer R. E. Robertson to amended complaint.
7. Motion to dissolve restraining order.

8. Answer to amended complaint (including Exhibit "A").
9. Demurrer of plaintiff to further and affirmative answer.
10. Order overruling demurrers.
11. Judge Reed's opinion.
12. Judgment for defendants.
13. Petition for appeal and supersedeas.
14. Assignment of errors.
15. Order allowing appeal.
16. Order fixing cost bond on appeal.
17. Cost bond on appeal.
18. Citation on appeal.
19. This praecipe.

Said transcript to be made up in accordance with the rules [53] of the District Court for Alaska, First Division, and the United States Circuit Court of Appeals for the Ninth Circuit.

WICKERSHAM & KEHOE,
GROVER C. WINN,
Attorneys for Appellant.

Service acknowledged and copy received this 11th day of February, 1924.

HELLENTHAL & HELLENTHAL,
Of Counsel for Defendants.

Filed in the District Court, Territory of Alaska, First Division. Feb. 11, 1924. John H. Dunn, Clerk. By ————, Deputy. [54]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

United States of America,
District of Alaska,
Division No. 1,—ss.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, John H. Dunn, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached fifty-four pages of typewritten matter, numbered from 1 to 54, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record, as per the praecipe of appellant, on file herein and made a part hereof, in the cause wherein Emery Valentine, for himself and all other taxpayers of the City of Juneau, Alaska, is plaintiff and appellant, and R. E. Robertson, B. M. Behrends, as Treasurer of the City of Juneau, and the City of Juneau, Alaska, are defendants and appellees, No. 2369–A, as the same appears of record and on file in my office, and that said record is by virtue of a petition for appeal and citation issued in this cause and the return thereof in accordance therewith.

I do further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination, and certificate, amounting to Twenty-five and 20/100 Dollars ($25.20), has been paid to me by counsel for appellant.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this 18th day of February, 1924.

[Seal] JOHN H. DUNN,
Clerk.

By ——————————,
Deputy.

[Endorsed]: No. 4204. United States Circuit Court of Appeals for the Ninth Circuit. Emery Valentine, Appellant, vs. R. E. Robertson, B. M. Behrends, as Treasurer of the City of Juneau, Alaska, and the City of Juneau, Alaska, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Filed February 27, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

NO. 4204.

In The

United States Circuit Court of Appeals

Ninth Circuit

EMERY VALENTINE, for himself and all other taxpayers of the City of Juneau, Alaska,

APPELLANT,

vs.

R. E. ROBERTSON, B. M. BEHRENDS, as Treasurer of the City of Juneau, and the CITY OF JUNEAU, ALASKA,

APPELLEES.

Brief and Argument.

JAMES WICKERSHAM,
JOSEPH W. KEHOE,
GROVER C. WINN,
Attorneys for Appellant.

In The

United States Circuit Court of Appeals

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EMERY VALENTINE, for himself and all other taxpayers of the City of Juneau, Alaska,

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R. E. ROBERTSON, B. M. BEHRENDS, as Treasurer of the City of Juneau, and the CITY OF JUNEAU, ALASKA,

APPELLEES.

Brief and Argument.

JAMES WICKERSHAM,
JOSEPH W. KEHOE,
GROVER C. WINN,
Attorneys for Appellant.

In The

United States Circuit Court of Appeals

Ninth Circuit

EMERY VALENTINE, for himself and all other taxpayers of the City of Juneau, Alaska,

APPELLANT,

vs.

R. E. ROBERTSON, B. M. BEHRENDS, as Treasurer of the City of Juneau, and the CITY OF JUNEAU, ALASKA,

APPELLEES.

Brief and Argument.

STATEMENT OF THE CASE

This suit was begun in the District Court for the First Divsion of the Territory of Alaska, by the plaintiff, appellant, as a taxpayer in Juneau, Alaska, for himself and all other taxpayers therein, to restrain the defendants from expending the funds of the city for purposes outside the municipal powers of the city.

AMENDED COMPLAINT

The amended complaint alleges, in brief, that on the 18th day of January, 1924, the city council of Juneau, passed an ordinance or resolution (the

In The

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STATEMENT OF THE CASE

This suit was begun in the District Court for the First Divsion of the Territory of Alaska, by the plaintiff, appellant, as a taxpayer in Juneau, Alaska, for himself and all other taxpayers therein, to restrain the defendants from expending the funds of the city for purposes outside the municipal powers of the city.

AMENDED COMPLAINT

The amended complaint alleges, in brief, that on the 18th day of January, 1924, the city council of Juneau, passed an ordinance or resolution (the

answer disclosed that it was a resolution), appropriating the sum of Two Thousand ($2,000.00) dollars of the public money in the city treasury, and directing that it be paid to Robertson, as a competent person selected by the council to defray his expenses to Washington, D. C., and return and to engage him while there to lobby before Congress and to present the desirability of the division of the Territory of Alaska into two territories, the erection of a government dock and public building and the establishment of a United States Land Office at Juneau, the dredging of Gastineau channel near Juneau, the digging of Hawk Inlet and Oliver Inlet canals, the establishment of a mail route on the north shore of Chichagof island, the dredging of Wrangell Narrows, and other objects set forth in said resolution.

It is further alleged that at said meeting on January 18, 1924, the council ordered a warrant drawn to Robertson in the sum of Fifteen Hundred ($1,500.00) dollars, and that he be privileged to draw for Five Hnundred ($500.00) dollars additional; that these sums be paid by the defendant city treasurer; that the $1,500.00 was paid to Robertson and was at that time in his possession, in Juneau, unexpended; that there was a collusion between the defendants and that no city official would attempt to stop the payment of the remaining $500.00 nor to recover the $1,500.00 in Robertson's

hands; that the proceeding was ultra vires and void; and prayed for an injunction to restrain the payment and expenditure of the money.

Page 2, Transcript.

On filing the original complaint the court granted a temporary restraining order, and on filing the amended complaint an amended restraining order, enjoining any further action in issuing an additional warrant for $500.00, or expending the $1,500.00 so delivered to Robertson, till the further action of the court on application for a permanent restraining order.

Page 14, Transcript.

ANSWER TO COMPLAINT

To the amended complaint defendants filed a demurrer (page 18, Tr.), and also their answer (page 20, Tr.). The answer generally admits the substantial allegations of the amended complaint, but denies the part charging the intention to lobby, and certain conclusions in the amended complaint alleging *ultra vires*. With respect to the allegation in the amended complaint that the money was appropriated to pay Robertson for services and expenses to Washington, D. C., to do lobbying before Congress, paragraph IV of the answer generally denies, "*but admits that said R. E. Robertson was*

employed as set forth in the resolution hereinafter set forth."

Page 23, Transcript.

In paragraph VI of the answer, "the defendants deny that R. E. Robertson accepted the employment to act as such lobbyist, as set forth in the amended complaint; *and deny that said R. E. Robertson agreed to act in any manner different from the manner set forth in the affirmative answer*" etc., (page 23, Tr.). While the answer does not deny paragraphs IX and X of the amended complaint, the subsequent allegations in defendants' affirmative defense show the allegations in IX and X are true in fact and in law.

The affirmative defense set up in defendant's answer, we think, admits all the allegations stated in our amended complaint by restating and affirming them, though in different language.

The Affirmative Answer alleges (briefly stated):

Page 24, Transcript.

I.

That the City of Juneau is a municipal corporation—and names its officials.

II.

That the City of Juneau is the commercial center, etc., and alleges its business importance.

III.

That the City of Juneau is the owner of its streets; that it needs new and permanent paving

which the city is unable to do unless it is authorized to issue bonds to pay therefor; that before it can be authorized to do the work it is necessary to have an Act of Congress authorizing the issuance of said bonds; that a bill has been prepared and introduced into Congress of the United States by the Delegate from Alaska, which if passed will give such authority; "*that it is necessary in order to secure the passage of said bill, to have a person who is conversant with the facts appear before the Committees of Congress to explain the facts of said Committees and work in conjunction with the delegate from Alaska to secure the passage of said bill authorizing said issuance of bonds.*"

IV.

That many persons in S. E. Alaska had chosen R. E. Robertson to represent them in Washington, D. C., "*and advocate certain legislation in connection with certain projects hereinafter enumerated in the Resolution passed by the City Council of the City of Juneau, on January* 18, 1924."

V.

That said S. E. Alaska projects would be of great benefit to the city of Juneau,—and the city council endorsed them.

VI.

"That the citizens of the City of Juneau and the community surrounding Juneau had made arrangements with said R. E. Robertson for him to

proceed to Washington, D. C., *and for him to use his best endeavors to forward the passage of legislation advancing the aforesaid projects, at which time the said R. E. Robertson consented to act for the city of Juneau in connection with the passage of the bill allowing the City of Juneau to issue bonds for street improvements, and to use his best endeavors before the committees of Congress by explaining the facts to them and the needs of the City of Juneau in this connection, if the City of Juneau would appappropriate sufficient money to pay his expenses in going to Washington."* Page 27, Tr.)

VII.

That on the 18th day of January, 1924, the common council of the City of Juneau, Alaska, passed a resolution setting forth the attitude of the city in regard to said several projects and appropriating Two Thousand ($2.000.00) dollars in order to defray the expenses of R. E. Robertson to Washington, D. C., which money so appropriated or so much thereof as was necessary, *was to be used by said Robertson in paying his expenses to Washington, while there, and return, in representing the city in connection with the bill authorizing the City of Juneau to issue bonds for street improvement purposes, a copy of which resolution is attached hereto, marked Exhibit A, and made a part hereof.* (Page 27, Tr.)

VIII.

That the City of Juneau derives its revenues, etc., from taxes on real and personal property, profits from its city dock, license taxes, police funds, etc.

IX.

That on the 19th day of January, 1924, Robertson cashed his warrant for $1,500.00 and now has the money in the bank. (Page 28, Tr.)

RESOLUTION OF CITY COUNCIL

The affirmative defense in the defendant's answer is based wholly upon the resolution passed by the city council making the appropriation of $2,000.00, authorizing its payment and expenditure, and providing for securing the services of the defendant Robertson. (See Exhibit A, pages 30-38 Tr.)

In the amended complaint it is alleged that this resolution was passed by the city council on January 18, 1924 (Page 3, Tr.). This case was begun on January 28th when the original complaint was filed and the first temporary injunction was issued. On January 29th the amended complaint was filed, alleging the passage of the resolution of January 18th, 1924, and upon the allegations in the amended complaint an amended and additional restraining order was issued and served on the defendants (Page 15, Tr.).

After all this had transpired, and at 7:30 P. M. on the evening of the 29th of January, 1924, the

city council was convened and an effort made by mutilating and amending the resolution of January 18th to insert in it apt phrases upon which to hang a defense to the action then pending. These facts appear upon the face of the defendant's answer and are subject to our demurrer thereto. (Page 27-28, Tr.) The attention of the Circuit Court of Appeals is especially called to this procedure and the mutilation of Exhibit A thereby. While our demurrer is held to admit the facts stated in the Answer, we call attention to the true facts, as shown in relation to this mutilation of the Resolution, on January 29th.

Even as thus mutilated and amended the resolution of January 29th, defendant's Exhibit A, (page 30, Tr.), covers the whole field of endorsement of political projects far distant from Juneau, as the following quotation therefrom will show: (Page 32, Tr.)

"Be it resolved that the common council endorse the projects referred to in the written resolutions, to-wit:

Division of the Territory of Alaska.
Erection of a government dock at Juneau.
Erection of a government building at Juneau.
Dredging of Gastineau Channel at Juneau.
Digging Hawk Inlet Canal.
Digging Oliver Inlet Canal.
Establishing a mail route on the north shore of Chichagof Island.
Establishing a Land Office at Juneau, Alaska.
Dredging of Wrangell Narrows."

Page 32, Transcript.

Then follows nine long whereases setting forth

the reasons why the city council endorsed these projects, followed by another denouncing the abandonment of Chilkoot Barracks, etc. Having endorsed all the political projects in S. E. Alaska, the Common Council then declared (all italics mine):

"And whereas it has become necessary to establish permanent streets in the city of Juneau *and in order to do so it is necessary that an Act of Congress be passed allowing the city of Juneau to issue bonds to make said street improvements;*

"And whereas a bill has been introduced in the United States Congress looking towards said authorization; and whereas *a local representative, familiar with the facts, should be sent to Congress to represent the facts to the committees of Congress and to work in conjunction with the delegate from Alaska to secure the passage of this bill;*

"And whereas the citizens of the city of Juneau have taken a great interest in the matters hereinbefore endorsed and have been negotiating with R. E. Robertson, a person eminently fit and conversant with the above matters, with a view of sending him to Washington to present the above mentioned matters to the committees of Congress; and whereas the city of Juneau is able to procure the services of said R. E. Robertson *in connection with the bill aforementioned* looking towards the authorization of the town of Juneau to issue bonds for street improvement without any further expense to the city of Juneau than the payment of said R. E. Robertertson's expenses to Washington, D. C., which the city of Juneau is able to do from funds in the treasury without laying a special tax for the purpose, and without increasing the levy for the current year.

"BE IT RESOLVED *that sufficient monies be appropriated out of the municipal treasury for the*

purpose of paying the expenses of said R. E. Robertson in connection with his trip to Washington, D. C., not exceeding the sum of Two Thousand ($2,000.00) dollars, and that a warrant be drawn in the sum of One Thousand Five Hundred ($1,500.00) dollars on the city Treasury in favor of said R. E. Robertson; and that he be privileged, if he find it necessary, to draw on the city treasury for the additional sum of Five Hundred ($500.00) dollars, which motion was seconded by Councilman McKinnon and upon the call of the roll upon the adoption of the motion, all councilmen present voted 'yea' and the motion was declared carried.

Signed: I. Goldstein, Mayor.
Wm. J. Reck, City Clerk."

Page 37-38, Transcript.

DEMURRER TO ANSWER

To this answer the plaintiffs filed a demurrer that it appears upon the face of the answer that the same does not state facts sufficient to constitute any defense or counterclaim to the said amended complaint of the plaintiff herein (Page 38, Tr.). On the argument the various matters now in the Assignment of Errors were presented to the court by which they and the demurrer were overruled.

JUDGMENT FOR DEFENDANTS

Since the pleadings taken together sufficiently stated the admitted facts, counsel for plaintiff announced to the district court that plaintiff stood upon his demurrer and would not reply; the court upon motion of the defendants entered judgment dissolving the restraining orders, dismissing plaintiff's case, and for costs in favor of the defendants,

to all of which plaintiff excepted, and took this appeal.

Page 57, Transcript.

SPECIFICATION OF ERRORS RELIED ON.

Page 61, Transcript.

The decree in this case is erroneous because the district court erred as follows:

I.

The court erred in overruling the plaintiff's demurrer to the defendant's affirmative answer.

II.

The court erred in holding that the matters set up in defendants' answer constituted any defense to the allegations in plaintiffs amended complaint.

III.

The court erred in holding that the common council of the city of Juneau, Alaska, had power or authority to adopt and pass the resolution of January 18th, 1924, and (or) the amended resolution of January 29th, 1924, for the payment of the sums therein mentioned to defendant Robertson for the uses therein set forth, or at all.

IV.

The court erred in holding that the treasurer of the city of Juneau, Alaska, or the city of Juneau, Alaska, had power and authority to make the payment of the sums mentioned in the said resolutions of January 18th and 29th, 1924, or either of them, to the said Robertson, for the uses therein set forth.

V.

The court erred in refusing to grant the prayer of the plaintiff's amended complaint.

VI.

The court erred in dismissing the plaintiff's complaint and action and in rendering judgment for defendants and against the plaintiff herein.

Page 61-62, Transcript.

POINTS AND AUTHORITIES

The main question in this case, if not the only one, is: Had the city council of Juneau power to authorize the appropriation of Two Thousand ($2,000.00) Dollars, or any sum, for the purposes declared in its resolution of January 18th, 1924, as amended by its resolution of January 29th, 1924?

The powers of the municipal corporation of Juneau are fully stated and limited in Chapter 97, Session Laws, Alaska, 1923, Art. 3, Sec. 12, pages 196-200:

"Sec. 12. General Authority of Council. The Council shall have and exercise the following powers:

First: To adopt rules and by-laws for their own proceedings.

* * *

Ninth: To assess, levy and collect a general tax for school and municipal purposes not to exceed two per centum of the assessed valuation upon all real and personal property, and to enforce the collection of such lien by foreclosure, levy, distress and sale, etc.

* * *

Seventeenth: To take such other action, by ordinance, resolution or otherwise as may be necessary to protect and preserve the lives, the health, the safety and the well being of the people of the city."

It is not claimed by the defendants that there is any special authority contained in the statutory charter giving the common council of Juneau power

to pass the resolutions of January 18th and 29th, 1924. In his argument in support of the defendants' acts the district judge does not point out any special statute which contains such power, but bases his conclusions on cases from other states where the charter powers may be entirely different.

Appellant contends there is no statutory or other authority in the council of Juneau to appropriate its public municipal funds for the uses stated in the resolutions of January 18th and 29th; that such appropriation was in direct violation of the letter and spirit of the city charter powers and, therefore, ultra vires and void..

RIGHT OF TAXPAYER TO MAINTAIN THIS SUIT

In his opinion the district judge states the correct rule in respect to this phase of this case:

"There is no question but that a taxpayer may enjoin the payment of moneys from the municipal treasury where the sum is about to be illegally appropriated by the municipal authorities. Public moneys in the treasury of a municipal corporation are held in trust by the municipal authorities for the benefit of the inhabitants thereof. The city council function as trustees and the citizens of the town are *cestui que trust; and a resident tax payer* may invoke the action of the court to prevent the misappropriation of municipal funds, or the illegal creation of a debt by the corporate authorities. See Crampton v. Zabriskie, 101, U. S. 601; Russell v. Tate, 13 S. W. 136; McIntire v. El Paso County, 61

Pac. 237; Lundler v. Milwaukee Elec. R. Co., 83 N. W. 851; 2 Dillon Mun. Corp. pp. 915-919, and notes; 3 McQuillan Mun. Corp. Sec. 2575; 19 Ruling Case Law, page 1163."

Page 45, Transcript.

FACTS ADMITTED BY DEMURRER

There can be no dispute about the facts in this case. They are alleged in the amended complaint and answer. The plaintiff is bound by the allegations in the amended complaint, and the defendants by such admissions as they made in their answer. The defendants are bound by their allegations in their answer, and the plaintiff is bound thereby also because of his demurrer thereto, upon which he stands in this court. So all the facts are before the court in the amended complaint and answer, and are admitted by the law.

Let it be clearly understood, however, that the law only compels us to admit our own allegations and those in the answer, but not those stated by the judge below in his argument and opinion.

For instance: in his opinion, at page 49, Transcript, the lower court makes the following statement of fact:

"As against the demurrer, the facts alleged in the complaint (answer?) must be taken as true. Boiled down, it appears from the answer that Mr. R. E. Robertson is City Attorney, and as such acts in a legal advisory capacity to the city council; the answer further shows that it is necessary for the

city council to provide funds for the construction of permanent streets; that under the bill now pending in Congress, the city is authorized to bond itself for that purpose, and that the appropriation of the money, payment of which is sought to be enjoined hereby, is to pay his expenses in going to Washington, to lay before Congress the necessity for relief in that regard by the passage of the Bill."

Our demurrer to the answer compels us to stand on the facts well pleaded in the answer, but this statement is so at variance with the facts in the answer that we call the attention of this court to it that we may not seem to admit the judge's version.

The only allegation in all the pleadings in respect to Robertson's official connection with the city of Juneau is the last clause of paragraph 1 in the answer, where it is alleged "and that the defendant R. E. Robertson **is** the acting city attorney" (Page 24, Tr.). In another part of the opinion the lower court states: "It is alleged, in substance, that R. E. Robertson **is** the acting city attorney", etc. (Page 48, Tr.). Here again the court mistakes the admitted fact; it is not alleged "in substance", but categorically, in the paragraph 1 of the affirmative answer as above stated.

We are bound by our demurrer to the enforced admission that at the time the affirmative answer was made and filed "that the defendant R. E. Robertson *is* the acting city attorney" (Page 25, Tr.), but we are not bound by the further statement in relation thereto made by the judge in argument.

Sec. 10, Chap. 97, Session Laws of Alaska, 1923, being the legislative charter of cities like Juneau, provides for the appointment by the council of a "municipal attorney" while Section 11 provides that in certain contingencies a "municipal attorney" may be elected for a term of one year. There is nothing in the record to show that Robertson was ever appointed or elected "municipal attorney" for Juneau ,and the allegation in the answer that the defendant R. E. Robertson *is the acting city attorney*" is a fair denial of the fact "that the defendant R. E. Robertson *is the city attorney, and as such acts in a legal advisory capacity to the city council.*" (Page 49, Tr.). Going outside the record, as the lower court did, we deny that statement. He was not at any time mentioned in this record, the municipal or city attorney for Juneau, except as it may be argued he was such "acting city attorney" *by reason of his appearance as attorney for the defendants, including himself, in the case at bar.*

Of course these matters may seem small and immaterial, and we would not notice them except the lower court seems to lay much stress on Robertson's official character, and also extends beyond their meaning other allegations in the affirmative defense covered by our demurrer. We think we are entitled to a correct statement of the facts. We respectfully suggest that the whole quotation we make from the opinion of the lower court is in dis-

agreement with the facts as admitted by our demurrer, and that the court was misled thereby to our prejudice in his application of the law to the real facts stated in the pleadings.

ROBERTSON'S REAL OFFICIAL CHARACTER.

In paragraph III of our amended complaint (Page 3, Tr.), we charge that the council by its resolution of January 18th provided for the employment of a competent person to go to Washington, D. C., *"to lobby before the Congress of the United States, for the division of the Territory" and certain other objects named therein;* and in paragraph IV (Page 4, Tr.) that the council *"selected and empowered the defendant R. E. Robertson as the delegate to go to the city of Washington under the terms of said ordinance or resolution and perform the various acts of lobbying for the enactment of legislation by Congress to procure the division of the Territory of Alaska, and other objects set forth in said ordinance or resolution."*

Page 4, Transcript.

In brief, we alleged the employment of Robertson by the city to do lobbying in Washington for the objects stated in the resolution, and the money whose payment it was sought to enjoin was appropriated to pay his expenses to Washington to do that lobby work.

We think the answer admits in the most sub-

stantial manner all the facts we alleged including the charge of lobbying.

The paragraph III of the answer to our paragraph III in the amended complaint concludes by a general denial to "*the whole and every part thereof, except as stated in the affirmative defense herein,*" (Page 21, Tr.).

Paragraph IV. of the answer to paragraph IV of our amended complaint admits that the council "*selected, empowered and employed the defendant, R. E. Robertson, as their delegate to go to the city of Washington, D. C.*, but denies that Robertson "*was employed by the city of Juneau to perform the various acts of lobbying,*" etc., "*but admit that said R. E. Robertson was employed as set forth in the resolution hereinafter set forth.*" Page 23, Transcript.

Paragraph VI of the answer to our paragraph VI of the amended complaint denies "that R. E. Robertson accepted the employment to act as such lobbyist, as set forth in the amended complaint, "*and deny that said R. E. Robertson agreed to act in any manner different from the manner set forth in the affirmative answer; and admit that said R. E. Robertson agreed to make the trip to Washington, D. C.,*" *etc.* (Page 23, Transcript.)

These denials and admissions amount to no more than a reference of the whole point in controversy to the facts stated in the resolutions.

A careful examination of the matter stated in the affirmative defense also brings us to the facts stated in the resolution, Exhibit A, attached to the answer, as the source of the controversy, and the basis of the defense. If the matter stated in that resolution contains enough to authorize the council to make the appropriation complained of the court will affirm, otherwise it will sustain our demurrer and reverse the case. The affirmative defense stands on the resolution, Exhibit A. (Page 30, Transcript.)

This resolution, remodeled on January 29th, 1924, was an afterthought, prepared after the amended complaint and restraining order was served on the defendants, but as we view it, does not materially assist the defendants, and shows upon its face the character in which Mr. Robertson was to go to Washington as delegate to assist the official Delegate from Alaska to secure the enactment of a wide range of legislation for the to-be-newly-created territory of Southeastern Alaska, and many other laws mentioned therein.

The resolution endorses the nine specific Acts of Congress which Mr. Robertson is to secure, repeats all the "whereases" and boosting arguments in favor of them at length, with special "whereases" in favor of a bill to improve the streets of Juneau, and concludes with the final resolution making the appropriation of $2,000.00 to pay Robertson's expenses to Washington and return.

We submit this document shows plainly and clearly the intention of the council of Juneau:

1. To endorse the various projects of the division of the Territory of Alaska into two territories, and also the eight other projects mentioned therein, equally.

2. That "*a competent person be selected by the common council of the city of Juneau to personally present these projects to the United States Congress and to work in conjunction with the Delegate from Alaska for the passage by Congress of bills covering appropriations for the above projects*, and resolve that sufficient funds be appropriated out of the municipal treasury and not exceeding Two Thousand ($2,000.00) dollars *for the purpose of defraying the expenses necessary to send the above mentioned person to Washington, D. C.*" (Page 31, Transcript.)

The attention of the court is called to the fact that the original resolution, of which the last above quotation is a part (and also repeated in Exhibit A) *was passed on January 18th*, 1924, *and the money paid to Robertson under that supposed authority on the 19th day of January*, 1924. See Paragraph IX of the affirmative defense where that fact is specially alleged. (Page 28, Transcript.)

3. That after the passage of the resolution of January 18th above quoted, and the payment to Robertson of $1,500.00 under that clause, and on

January 29th—ten days later—the resolution of January 18th was remodeled as it now exists in Exhibit A. (Page 30, Transcript.)

4. That in the whereas in the newly stated Exhibit A resolution of January 29th it is declared, by additions (Italics mine):

"And whereas a Bill has been introduced in the United States Congress looking toward said authorization; and whereas *a local representative familiar with the facts should be sent to Congress to present the facts to the Committees of Congress and to work in conjunction with the Delegate from Alaska to secure the passage of this Bill;*

And whereas the citizens of the city of Juneau have taken a great interest in the matters hereinbefore endorsed and have been negotiating with R. E. Robertson, a person eminently fit and conversant with the above matters, *with a view of sending him to Washington to present the above mentioned matters to the committees of Congress;* and whereas the city of Juneau is able *to procure the services of said R. E. Robertson in connection with the Bill aforementioned looking towards the authorization of the Town of Juneau to issue bonds for street improvement without any further expense to the city of Juneau than the payment of said R. E. Robertson's expenses to Washington, D. C.*, which the city of Juneau is able to do from funds in the treasury without levying a special tax for the purpose, and with-

out increasing the tax levy for the current year." (Page 37, Transcript.)

Then, as a conclusion to the whole of the two resolutions of January 18th and that of January 29th, remodeling it, the council passed this:

"Be it resolved, *that sufficient monies be appropriated out of the municipal treasury for the purpose of paying the expense of the said R. E. Robertson in connection with his trip to Washington, D. C.*, not exceeding the sum of Two Thousand ($2,000.00) dollars, and that a warrant be drawn in the sum of One Thousand Five Hundred ($1,500.00) dollars on the city treasury in favor of said R. E. Robertson; and that he be privileged, if he find it necessary, to draw on the City Treasury for the additional sum of Five Hundred ($500.00) dollars, which motion was seconded by Councilman McKinnon and upon the call of the roll upon the adoption of the motion all councilmen present voted "Aye" and the motion was declared carried.

I. Goldstein, Mayor.

Wm. J. Reck, City Clerk."

Page 37-38, Transcript.

5. The motion thus adopted was the whole of Exhibit A including so much of the Resolution of January 18th as was included therein.

6. No part of the resolution of January 18th under which Robertson was paid the $1,500.00 of January 19th and the 21st was revoked or repealed

by the resolution of January 29th, Exhibit A.

7. Special attention is called to the fact that the resolve in Exhibit A confirms the payment of the money formerly paid to Robertson under the resolution of January 18th, *for the purpose of paying the expense of the said R. E. Robertson in connection with his trip to Washington D. C.* (Page 37, Transcript.)

8. And the payment was not limited in any way to services for lobbying for the Bill for street improvements in Juneau. It was as much for division of the Territory and the eight other projects.

9. That a fair construction of the affirmative defense and the resolutions embodied in Exhibit A is that the money appropriated was to be and was paid to Robertson as the chosen delegate of the council to go to Washington and lobby for all the projects thus endorsed in the resolutions. The contract was one and indivisible and was not in any manner limited to municipal purposes for the benefit of the municipality of Juneau.

AN APPROPRIATION FOR FUTURE LOBBY SERVICES VOID.

Judge Reed fairly held, we think, that the money so appropriated in connection with Mr. Robertson's trip to Washington was for lobbying, and he said "But not all contracts to expend moneys to persons to secure legislative action are void." (Page 50, Transcript.)

In his argument and opinion he said:

"Mr. Robertson, according to the answer, is the acting city attorney and legal adviser of the city. He is not to receive any compensation, contingent or otherwise, for his services." (Page 51, Transcript.)

Probably not from the city of Juneau, but how does the court know what he is to receive from the various citizens of Southeastern Alaska, who are also shown to be so deeply interested in the eight or nine other projects endorsed by the resolutions of January 18th and 29th in Exhibit A?

"He is not seeking to influence Congress for the private benefit of any person or class of persons." (Page 51, Transcript.)

There are a great many persons in Juneau who disagree with that statement of the matter, and the record does not justify the conclusion.

"He will represent the municipal corporation for public municipal purposes." (Page 51, Tr.)

How can any one guess that in view of the language of Exhibit A? And, too, "lobbying" for the other eight or nine projects admitted in the affirmative answer and the resolutions is not a "municipal purpose".

In short, no one can tell from the allegations in the affirmative defense, and Exhibit A, just what the delegate of the council may do in Washington. And the record shows, by the official resolve of January 18th and 29th, that he is authorized to do lobby

work for all the projects mentioned therein; that there is no separation of those which are foreign to the municipality of Juneau from that claimed to be special to it; that the appropriation is general for "*paying the expenses of the said R. E. Robertson in connection with his trip to Washington, D. C.,*" which includes, and was intended to include, all the projects. The contract of employment was (1) general as to all the projects mentioned in the resolutions; (2) was not limited in the character of the work to be done by Mr. Robertson to professional services; (3) but was broadly an employment to solicit members of Congress and others to enact all the bills necessary for the creation of the eight or nine projects endorsed; (4) without any limitation upon the class or kind of solicitation, honest or dishonest.

Even if we assume (and it must be an assumption) that Mr. Robertson will not violate the ethical rules of his profession, it is a lobbying contract broad enough to permit another person not so honestly inclined to resort to every class of dishonest lobbying,—and *it is the contract we are criticising* and not Mr. Robertson. He may be honest and ethical, but the next lobbyist employed under this identical precedent may not be either—and it is the general rule the court must consider, and not the assumption that Mr. Robertson will not do *what he is clearly permitted to do* under this resolution.

We respectfully urge, therefore, that the service to be performed by Mr. Robertson under these resolutions is that of lobbying—soliciting congressmen in Washington; that it is general, and not limited to the municipal wants of Juneau, nor limited to ethical services, but broad and unlimited, and includes every vice of lobbying which the law condemns.

IS THE CONTRACT A VALID ONE?

Lobbyist. One who frequents the lobby or the precincts of a legislature or other deliberate assembly with the view of influencing the votes of the members.

Black's Law Dictionary
Century Dictionary
Colusa County v. Welch (Cal) 55 Pac. 243.
La Tourneux v. Gilliss (Cal) 82 Pac 627.
Sweeney v. McLeod (Or) 15 Pac. 275.
Trist v. Child, 88 U.S. 441, (448) 22 L. Ed. 623.

What is a lobbyist? A lobbyist is defined to be one who frequents the lobby or the precincts of a legislature or other deliberative assembly with the view of influencing the views of the members. Sometimes defined as a person who hangs around legislators and solicits them for the purpose of influencing legislation. "To lobby" is to solicit members of a legislative body, whether in the lobby or elsewhere, with the purpose of influencing their votes. Webster's Dict.; Worcester's Dict.; Century Dict. Tit. "Lobby—lobbyist". "To lobby" is for a person not belonging to the legislature to address or

solicit members of a legislative body, in the lobby or elsewhere away from the house, with a view of influencing their votes. Chippewa Valley & S. R. Co. v. Chicago, St. P. M. & O. R. Co. 75 Wis. 224, 44 N. W. 17, 6 L. R. A. 601. "Lobbying services are generally defined to mean the use of personal solicitations, the exercise of personal influences and improper or corrupt methods, whereby legislative or official action is to be the product. A contract for such services is void, and cannot be enforced. Dunham v. Hastings Pavement Co. 56 App. Div. 244, 67 N. Y. Supp. 632-634; Trist v. Child, 88 U. S. (21 Wall.) 441-448, 22 L. Ed. 623; Oscangan v. Arms Co. 103 U. S. 261, 22 L. Ed. 539."

Burke v. Wood, 162 Fed. 533, 537, 541.

The leading case in the Federal courts in this class of cases—not involving, however, the wants of power in municipal bodies—is that of Trist x. Child, 88 U. S. 441, 22 L. Ed. 623. That was a suit by Child against Trist to recover for services in prosecuting a claim before Congress; the defense was that it was a contract for lobbying and therefore void. The Supreme Court sustained the defense, saying:

"Was the contract a valid one? It was, on the part of Child, to procure by lobby service, if possible, the passage of a bill providing for the payment of a claim.

* * * *

The question now before us has been decided by four American cases. They were all ably considered, and in all of them the contract was held to be against public policy and void. Chippinger v. Hepbaugh, 5 Watts & S. 315; Harris v. Roof, 10 Barb. 489; Rose v. Truax, 21 Barb. 361; Marshall v. R. R. Co., 16 How. 314. We entertain no doubt that in

such cases, as under all other circumstances, an agreement express or implied for purely professional services is valid.

* * * *

But such services are separated by a broad line of demarcation from personal solicitations, and the other means and appliances which the correspondence shows were resorted to in this case. There is no reason to believe that they involved anything corrupt or different from what is usually practiced by all paid lobbyists in the prosecution of their business.

* * * *

The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate and, considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy. No one has a right, in such circumstances, to put himself in a position of temptation to do what is regarded as so pernicious in its character. The Law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking.

* * * *

If the agent is truthful, and conceals nothing, all is well. If he uses nefarious means with success, the spring head and the stream of legislation are polluted. To legalize the traffic of such service, would open a door at which fraud and falsehood would not fail to enter and make themselves felt at every assessible point. It would invite their presence and offer them a premium.

* * * *

We are aware of no case in English or American jurisprudence like the one here under consideration,

where the agreement has not been adjudged to be illegal and void. We have said that for professional services in this connection a just compensation may be recovered. But where they are blended and confused with those which are forbidden, the whole is a unit and indivible. That which is bad destroys that which is good, and they perish together. Services of the latter character, gratuitously rendered, are not unlawful. The absence of motive to wrong is the foundation of the sanction. The tendency to mischief, if not wanting, is greatly lessened. The taint lies in the stipulation. Where that exists, it affects fatally, in all its parts, the entire body of the contract. In all such cases, *potior conditio defenddentis.* Where there is turpitude, the law will help neither party.

The elder agent in this case is represented to have been a lawyer of ability and high character. The appellee is said to be equally worthy. This can make no difference as to the legal principles we have considered, nor in their application to the case at hand. The law is no respector of persons."

Trist v. Child, 88 U. S. (21 Wall.) 441.

Meguire v. Corwine, 101 U. S. 108, 25 L. Ed. 899.

Providence Tool Co. v. Norris, 69 U. S. (2 Wall.) 45; 17 L. Ed. 868.

And in the case at bar there is no charge of dishonest or unprofessional conduct against Mr. Robertson—*he has not yet done any act, good or bad* —but the charge is directed against the authority granted by the resolutions of January 18th and 29th, which is broad enough to authorize in the name of the city, every phase of lobby practice condemned in the Trist v. Child case—good or bad. .

It was held by the United States Court of Appeals, Sixth Circuit, Judges Taft, Lurton and Severens:

"The contract must stand or fall dependent upon the validity or invalidity of the ordinance as it was enacted. Trist v. Child, 21 Wall. 441."

Manhattan Trust Co. v. City of Dayson, 59 Fed. 327, 333.

Under such a contract as that in this case the lobbyist may do all the evil things condemned by the courts—*it is this illgal contract which is ultra vires and void.* If the contract is held valid in this case, because no evidence is presented that Mr. Robertson has acted unethically, it must be held valid in all other cases, until the lobbyist is convicted. Such a holding will open wide the door to all the evils of lobbying, so universally condemned by the law and the courts.

"It is the duty of the court to carefully scrutinize contracts of this general character, and to condemn the very appearance of evil, as the tendency of such contracts is to lead to the encouragement of wrong doing. Hence the relief asked for in such cases should not be granted. This result follows "without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country. Tool Co. v. Norris, 2 Wall. 45, Trist v. Child, 21 Wall, 444, 452, 22 L. Ed. 623; Meguire v.

Corwine, 101 U. S. 108, 111, 25 L. Ed. 899; Oscanyan v. Arms Co. 103 U. S. 261, 275, 26 L. Ed. 539."

Washington Irr. Co. v. Krutz, 119 Fed. 279, 286. (Ninth Circuit).

In Herrick v. Brazee (Or.) 190 Pac. 141, the Supreme Court of Oregon has followed the principles so clearly stated in Trist v. Child, Supra, and other Federal cases, and said:

"A valid distinction is made between lobbying services in procuring the passage of legislation and strictly legitimate professional services of an attorney directed to that end," etc.

It is also important to note in this Oregon case, that Congress legalized the contract objected to, in the Act appropriating the fund to pay the claims.

All agreements to influence a legislative body are void, even though it is not shown that corrupt action or secret or improper means are contemplated. It makes no difference in this view of the case whether undue influence or solicitation was in fact used. It is sufficient to vitiate the agreement if such means are within its scope, although not actually employed or even expected.

Trist v. Child, 88 U. S. (21 Wall.) 441; 22 L. Ed. 623.

Sussman v. Porter, 137 Fed. 161.

Owens v. Wilkinson, 20 App. D. C. 51.

Colusa County v. Welch (Cal.) 55 Pac. 243.

La Tourneux v. Gillis, (Cal.) 82 Pac. 627.

Sweeney v. McLeod, (Or.) 15 Pac. 275.

Hyland v. Oregon Paving Co. (Or.) 144 Pac. 1160.

Glenn v. S. W. Gravel Co. (Okla.) 177 Pac. 586.

McGuffin v. Coyle & Guss, (Okla.) 85 Pac. 954, 86 Pac. 962.

Wood v. McCann, 6 Dana. (Ky.) 366.

Henderson v. City of Covington, 77 Ky. (14 Bush) 312.

Usher v. McBratney, 3 Dill 385. Case No. 16, 805 Fed. Cas. Reported by Judge Dillon, (See Note.)

MUNICIPAL POWERS IN ALASKA

Towns in Alaska have only such powers as are expressly granted to them by Congress or by the Legislature, and such implied powers as are necessary to enable them to carry into effect those expressly granted. No powers can be implied except such as are essential to the objects and purposes of the corporation as created and established.

In re Bruno Monro, 1 Alaska 279.

Ketchikan v. Citizens Co. 2 Alaska 120.

Conradt v. Miller, 2 Alaska 433.

Fairbanks v. Meat Market, 4 Alaska 147. .

Town of Ketchikan v. Zimmerman, 4 Alaska 336, 341.

Ballaine v. Seward, 5 Alaska 734.

Valdez v. Valdez Dock Co., 5 Alaska 399. .

Juneau Ferry Co. v. Morgan, 236 Fed. 204.

The following authorities support the general rule:

Ottowa v. Carey, 108 U. S. 110, 27 L. Ed. 669.

Concord v. Robinson, 121 U. S. 165, 30 L. Ed. 885.

Hill v. Memphis, 134 U. S. 198, 33 L. Ed. 887.

Barnett v. Denison, 145 U. S. 135, 36 L. Ed. 652.

Stone v. Bank of Commerce, 174, U. S. 412, 43 L. Ed. 1028.

Dillon Mun. Corp. 4th Ed. Sec. 89.

McQuillan Mun. Corp. Vol. 5, Sec. 2165.

In the case at bar the judge of the lower court in his opinion lays down the rules applicable to the power of a municipal corporation, in the following language:

"It is well settled that a municipal corporation has such powers and such only as (1st) are expressly granted; (2) are fairly or necessarily implied from those granted; (3rd) are essential to the declared objects or purposes of the incorporation.

As to the third, it is not enough that they be convenient, or general, or indirectly act for the advantage of the corporation. It must appear that they are indispensable to the purposes of the corporation, and in case of doubt of the existence of the power of the corporation to make an appropriation, the same should be denied by the court. If the project or purpose for an appropriation is made under the pretence of actual authority but intended to promote some unauthorized purpose, the courts will declare it illegal. If the primary object of a public expenditure is to subserve a public municipal purpose, the expenditure is legal notwithstanding

it also involves as an incident an expense which, standing alone, would not be lawful; but if the primary purpose of an appropriation is to promote some purpose not within any express or implied powers of a corporation, the expenditure would be illegal, even though it may incidentally serve some public purpose (See McQuillan on Municipal Corporations, Vol. 5, paragraph 2165." (Page 47, Tr.)

We concede this is a correct statement of the rules of law applicable to the case at bar, but we do not concede the court made a correct application of these rules to the admitted facts in the record in this case.

ALL ACTS BEYOND THE SCOPE OF THE POWERS GRANTED ARE VOID

The rule in the 8th Circuit is stated clearly in the case of City of Fort Scott v. W. G. Eads Brokerage Co., 117 Fed. 51, 54, as follows:

"Municipal corporations are creatures of the statutes under which they are organized and operated. By those statutes their powers are granted, measured, and limited. Beyond the limit of the powers there expressly granted and those fairly implied therefrom or incident thereto they cannot lawfully act or agree to act, and a fair and reasonable doubt of the existence of a corporate power is fatal to its being. Contracts for the lawful exercise of the powers of a corporation are binding and enforceable. But agreements of municipalities beyond the scope of their granted powers are null, and as though they had not been. They are void against the state because they are unlawful assumptions of powers which it has reserved. They are void between the parties to them, because those

parties are charged with knowledge of the statutes, and of the limits of corporate powers there fixed; and no formal assent of corporations or officers, no alleged estoppel can give validity to such agreements, or induce the courts to enforce them. Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co. 51 Fed. 309, 316, 2 C. C. A. 174, 230; I. Dill. Mun. Corp. (3rd Ed.) Sec. 89; Central Transp. Co. v. Pullman's Car Co. 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; McCormick v. Bank, 165 U. S. 538, 549, 17 Sup. Ct. 433, 41 L. Ed. 817. Bank v. Kennedy, 167 U. S. 362, 367, 17 Sup. Ct. 831, 42 L. Ed. 198; Bank v. Hawkins, 174 U. S. 364, 370, 19 Sup. Ct. 739, 43 L. Ed. 1007; Putney Bros. Co. v. Milwaukee Co. (Wis.) 84 N. W. 822, 823; Trester v. City of Sheboygan, (Wis.) 58 N. W. 747; Mousseau v. Sioux City (Iowa) 84 N. W. 1027; Von Schmidt v. Widbur (Cal.) 38 Pac. 682; Dube v. Peck, (R. I.) 48 Atl. 477, 479; Gaslight & Coke Co. v. City of New Albany (Ind. Sup.) 59 N. E. 176, 178; James v. City of Seattle, (Wash.) 62 Pac. 84, 79 Am. St. Rep. 957."

The following citations from California, Oregon and Washington quote the same general rule:

Galindo v. Walter (Cal.) 96 Pac. 505..

City of Arcata v. Green (Cal.) 106 Pac. 86.

City v. Lisenby (Cal.) 166 Pac. 333, 335.

Naylor v. McColloch (Or.) 103 Pac. 68.

Robertson v. City (Or.) 149 Pac. 545, 547.

State v. Tacoma (Wash.) 166 Pac. 66.

State v. Bridges (Wash.) 166 Pac. 780.

The case of Henderson v. the City of Covington, 77 Ky. (14 Bush) 312, is on all fours with the case at bar. As to the *power of the council to pay expenses of this kind, for lobbying*, that court said:

"With the question whether their corporate powers should be enlarged, the corporate authorities, as such, had no concern. Their duties and powers were ascertained and fixed by the legislature which created the corporation to exercise the powers granted, and perform the duties imposed, and the city council has no authority to appropriate any of the revenues of the city except to enable it to discharge some duty imposed by law, or to accomplish some object for which the corporation was created. (Stetson v. Kempton, 13 Mass. 271). The members of the city council, in their capacity of citizens, had a right to apply to the legislature to enlarge the powers of the corporation; but it would be dangerous in the extreme to hold that they might employ the power already granted and the money belonging to the city to obtain, through persons sent by them to appear before the General Assembly, an increase of the powers of the corporation. If the authorities of cities and towns, may, at their discretion, use the corporate revenue to procure such legislation as they may deem to the interest of their municipalities, the worst consequences may be apprehended. Such a practice would inevitably lead to abuses, and the history of municipal corporations in this country during the last quarter of a century gives ample warning of the danger of relaxing the well-established rule that municipal charters are to be strictly construed, and the powers of corporate authorities confined to such as are granted in express words, or are necessarily and fairly implied, or are essential to the objects of their creation."

Appellant offers this Kentucky case to the court as containing the very principle upon which we choose to stand in the case at bar.

In the case of Colusa County v. Welch (Cal.),

55 Pac. 243, 245, the court said of the power of county supervisors in a similar case:

"In the case at bar the supervisors had no duty in the premises to perform. They had no authority to influence, or to employ others to influence, the legislature in the action which, in its wisdom, it should see fit to take. If the board could do so in the present case, then, by a parity of reasoning, it could do so in all matters of revenue, and in all cases which might indirectly affect the interests of the country. If the board of a given county may exercise such authority, then like boards in all other counties may exercise like authority in like cases, and there is a possibility of a corps of attorneys being always in attendance upon sessions of the legislature to influence the action of members in matters confided to the judgment of the latter. There is no such authority given, either directly or by implication, to boards of supervisors, and the attempt to exercise it by the board in the case at bar was null and void."

The same rule is established in the State of Washington:

"The city Council (of Seattle) passed an ordinance providing that a committee, consisting of the whole council and such executive officers of the city as might be chosen by the council, should visit certain cities (Duluth, West Superior, St. Paul and Minneapolis, Minn., Great Falls, Mont., Spokane, Wash. and others) to secure information on subjects of water works, street paving, street lighting, etc. Certain members of the council visited the cities named, and made expenditures for their transportation, board and lodging; and thereafter a claim of one of the members was reported by the council and approved, and the ordinance adopted, directing a warrant to be drawn for the claim, and appropri-

ating money from the general fund to pay the same; HELD, that as the compensation of a member of a council may not be changed during his incumbency of office, and as the expenditure could not be regarded as necessarily essential for municipal purposes, and no expenditure of money for such a purpose being expressly authorized by legislation, or impliedly authorized by reason of necessary grant of power, the council had no authority to pass the ordinance directing the payment of the claim, and making an appropriation therefor."

James v. City of Seattle, 62 Pac. 84.

A more recent case in Washington makes the same point in relation to want of power in a municipal corporation to spend public money to defeat a referendum limiting its powers. State v.Superior Court, 160 Pac. 755.

"This corporation, the port of Seattle, is a creature of the State. It is in the nature of a municipal corporation engaged in the business of building wharves and docks and harbor improvements, and in operating and maintaining the same. Its powers are given by the State. If the State desires to limit those powers, the port itself and its commissioners have no special interest therein. They are simply agents of the State, and it seems absurd to say that an agent of the State may be permitted to expend money of the State for the purpose of defeating a proposed curtailment of the powers of that corporation by the State. No such power is expressly granted to the corporation, and it is not a necessarily or fairly implied incidental power to those expressly granted.

* * * *

We are of the opinion, therefore, that the port of Seattle, and its commissioners have not authority

to expend the money of the corporation in an endeavor to defeat any law which has been passed by the legislature, and referred to the people for approval or rejection. The approval or rejection of the amendment proposed to the Port of Seattle is a matter of no concern to the port itself, or its commissioners. As stated above, this corporation is a branch of the State government, municipal in its character, and its authority is limited to the powers expressly granted or necessarily inferred from express grants. If the port commissioners may take the money of the port, acquired by taxation upon property within the district or otherwise, for political purposes, or purposes other than those for which the port was organized, then there is no limit upon the port commissioners in expending the money of that port. The commissioners might determine that the best interests of the business of the port required that the individual members of the commission be perpetuated in office, and because of that reason, use the funds of the port to insure their own election. We are clearly of the opinion that, when the port was created, no thought was held by any person that the money raised by the port could be used for political purposes, or any purpose other than for the direct use of the port and its business."

The case of Fields v. City of Shawnee (Okla.) 54 Pac. 318, is squarely in point *on the want of power of a municipality to make the agreement;* the syllabus of the case, *by the court*, states the point clearly:

"The defendant, a municipal corporation, entered into a contract with the plaintiff to go to Washington to present facts and reasons to the Secretary of the Interior to induce said officer to require the location of a railroad upon a line running

through the limits of the territory of the defendant corporation, and agreeing to pay the plaintiff for said services, Held, that said contract was not in furtherance of any purpose for which the defendant corporation was created, nor within the general scope of its powers; that it was therefore ultra vires and void, and no recovery could be had thereon."

The same rule prevails in Massachusetts:

"Another less important question is presented in this case. The town, in 1881, voted to appoint a committee to appear before the Legislature and procure the passage of an act authorizing the town to pay these bounties, with authority to employ counsel if necessary. The committee employed counsel and procured the passage of the act above cited in 1882, and rendered its bill of expense to the town, which at a meeting held on Sept. 2, 1882, voted to pay the bill of the committee. It was clearly no part of the duty or functions of the town to procure the passage of this statute, and it cannot legally appropriate money to pay the expenses of procuring its passage. Minot v. West Roxbury, 112 Mass. 1, Coolidge v. Brookline, 114 Mass. 592."

Mead v. Acton (Mass.) 1, N. E. 413.

Frost v. Belmont (Mass.) 6 Allen, 152, 163.

In Rose v. Truax, 21 Barb. (N. Y.) 361, It is said that an agreement in respect to lobby services, and in effect providing for the sale of an individual's personal influence to procure the passage of a private law by the legislature, is void, as being inconsistent with public policy, and will not support an action; and if the contract be an entire one, and if it be void in part, it is void in toto.

A municipal corporation has no power to ap-

propriate city funds to purchase gold medals for members of the city council; Sillcocks v. City of New York, 11 Hun. 431; nor to entertain visiting editorial party; Gamble v. Village of Watkins, 7 Hun. 448; nor to pay the city funds to procure draftees in the army, 13 Misc. Rep. 707, 35 N. Y. Supp. 167.

It has been held that a county may not employ attorneys to contest a division of the county; Henley v. Clover, 6 Mo. App. 181; nor to litigate a matter in which the parties interested were certain towns of the county, and not the county; People ex rel Slossom v. Weschester Co. 116 App. Div. 884, 102 N. Y. Supp. 402; nor in general may the county employ attorneys where there is no clear authority to do so. Kersey v. Turner, 99 Ind. 257.

MUNICIPAL POWER IN DOUBT

Any doubt as to the existence of a particular power will be resolved against the city and the right to exercise it denied.

Egan v. City of S. F. (Cal.) 133 Pac. 294.
City x. Lisenby (Cal.) 166 Pac. 333.
Kellar v. City (Cal.) 178 Pac. 505.
State v. Gas Co. (Mont.) 173 Pac. 799.
In re Lankford (Okla.) 178 Pac. 673.
Sharkey v. City (Mont.) 155 Pac. 266.
Cole v. City of Seaside (Or.) 156 Pac. 569.

City of Fort Scott v. Eads. (8th Circuit) 117 Fed. 51.

Omaha El. Co. v. Omaha, (8th Circuit) 179 Fed. 455.

Boise v. Boise Water Co. (9th Circuit) 186 Fed. 705.

NOTICE AS TO MUNICIPAL POWER.

"Parties dealing with a municipal corporation are bound to know the extent of the powers lawfully confided to the officers with whom they are dealing in behalf of such corporations and they must guide their conduct accordingly. Murphy v. City of Louisville, 9 Bush. 189."

Stone v. Bank of Commerce, 174 U. S. 412. 424, 43 L. Ed. 1033.

POWER TO PROCURE CONGRESSIONAL LEGISLATION.

The court will take judicial notice that by the Act of Congress of May 7, 1906, 34 Stat. L. 169, the Congress authorized the people of Alaska to elect a delegate to the House of Representatives with the general powers of a Representative in Congress, with certain well known exceptions. It follows that the City of Juneau has no power to pay its funds for the services or expenses of a private Delegate (or lobbyist) to perform the duties of that official, either to oppose or assist him therein, any

more than it would have the power to appropriate the funds to pay the expenses of a municipal delegate (or lobbyist) to go to Washington to oppose or assist the President of the United States, or some Department or Bureau of the Government, in respect to his or their Alaskan duties.

The power thus lodged in the Delegate from Alaska by Congress is exclusive in so far as the Territory of Alaska and its municipal corporations are concerned. It seems that a mere statement of this matter concludes the argument on the question of power.

The power of a municipal attorney is also clearly limited by Sec. 23, Chap. 97, Sess. Laws, Alaska, 1923, as follows:

"Sec. 23. Duties of Municipal Attorney. The municipal attorney shall be the legal advisor of the council and other officers of the city in reference to their official duties, and he shall represent the city as attorney in all civil and criminal proceedings in which the city is interested."

We submit that this is a limitation on his right to go to Washington to solicit legislative action, even if Mr. Robertson was or is municipal attorney, which the admitted facts show he is not.

GENERAL WELFARE CLAUSE—POWER.

The powers specially granted to the municipal corporations in Alaska are set out in the Act of the last legislature, and are followed by a general welfare clause, as follows:

Chap. 97, Sess. Laws of Alaska, 1923, Art. 3, page 196.

"Sec. 12, General authority of council. The common council shall have and exercise the following powers: —then follows the grant of specific powers, and then—

"Seventeenth: To take such other action by ordinance, resolution or otherwise as may be necessary to protect and preserve the lives, the health, the safety and the well being of the people of the city."

Sess. Laws Alaska, 1923, page 200.

There is no other general welfare clause in the Act. Clearly the appropriation made of the city funds by the common council of Juneau in its resolutions of January 18th and 29th, as declared in the Answer, will not tend to protect and preserve the "lives" or the "health", or the "safety" of the people of Juneau, and no such claim is or can be made in the argument. Will the appropriation for the uses alleged "protect and preserve" the "well being" of the people of the town?

The Century Dictionary gives this definition of "well being". "Well being. Well conditioned existence; good mode of being; moral or physical welfare; a state of life which secures or tends toward happiness."

"Well conditioned.. In good or favorable condition; in a desirable state of being; as, a well conditioned mind."

These and other definitions of the words included therein seem to refer to the moral or physical welfare of the inhabitants of the town, to their safety and happiness in their homes, and do not, certainly, cover a plan of using their public moneys for jaunts to Washington to solicit legislation about which the people have not been consulted in a legal way, by ballot or otherwise.

The established rule in respect to the construction of the powers conferred by a "general welfare clause," such as that above quoted, is stated in 28 Cyc, pages 705, 706, and the rule stated as follows:

"In either case this "general welfare clause" must be construed as conferring no other powers than such as are within the ordinary scope of municipal authority, or which are necessary to accomplish municipal purposes."

Watson v. Thompson, 116 Ga. 546, 42 S. E. 747, 94 Am. St. Rep. 137, 59 L. R. A. 602.

Leavenworth v. Norton. 1. Kan. 432.

New Orleans v. Phillippi, 9 La. Ann. 41.

Spaulding v. Lowell, 23 Peck. (Mass.) 71.

The rule in the Federal courts is clearly stated in a case from the Sixth Circuit, where the court said:

"It is the settled rule that any such general words and phrases following or in connection with the granting of enumerated powers are to be construed in connection with such granting, and do not operate to convey broad powers disconnected with the previous subjects of the grant. In other words, it is the accepted theory of construction as applied

to municipal charters that the statute specifies with reasonable particularly the powers granted, and thus limits and defines the municipal government established, and that "general welfare" and similar clauses are intended to operate, and do operate, only so far as necessary to carry out and effectuate the specific grants. This rule has not been better expressed than by the Supreme Court of Tennessee, in construing this very charter. In Long v. Taxing District, 75 Tenn. (7Lea) 134, 138, (40 Am. Rep. 55), Judge Cooper said:

"If the only power given to pass ordinances be by a general provision, the provision would be liberally construed. But if the general grant is given in connection with, or at the end of, a long list of specified powers, the power conferred by the general clause would be restricted by reference to the other provisions of the act. Even in the broadest view, the general power would only authorize suitable ordinances for administering the government of the city, the preservation of the health and comfort of its inhabitants, the convenient transaction of business within its limits, and for the performance of its general duties required by law of municipal corporations. It would **not** authorize general legislation proper only for the Legislature of the State. To sustain such legislation by a municipal council, there must be special authority."

Cumberland Tel. & Tel. Co. v. City of Memphis, 200 Fed. 657..

AUTHORITY RELIED ON BY DEFENDANTS.

The only decision cited by the court below which gives support to the defendant's theory in this case is that of Meehan et. al. v. Parsons, 271, III, 546, III, N. E. 529. An inspection of that case shows (1) it

reverses the opposing view of the Illinois Appellate Court, (2) without citing a single authority in support of its view, and (3) does not state the law of Illinois granting power to the municipal corporation whose acts it sustained.

Upon this barren case this court is now asked to overturn a well established principle of municipal law, and we respectfully suggest that the court ought not to take that action without a more careful examination of the principle than the Illinois court gave in its decision.

Under the legislative grant of powers to municipal corporations in Alaska, and the general rules of construction announced by the courts, *there was no power in the common council of Juneau to appropriate municipal funds for the object stated in the Resolutions of January* 18*th and January* 29*th*, depended on in the Answer in this case; our demurrer to the Answer should be sustained, and the action of the lower court reversed with instruction to enter judgment thereon for the plaintiff.

Counsel have thus stated their argument fully in this brief and argument, and submit the case without oral argument.

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NO. 4204

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMERY VALENTINE, for himself and all other taxpayers of the City of Juneau, Alaska,

Appellant,

vs.

R. E. ROBERTSON, B. M. BEHRENDS, as Treasurer of the City of Juneau, and the CITY OF JUNEAU, ALASKA,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, DIVISION NUMBER ONE.

BRIEF OF THE APPELLEES

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STATEMENT OF THE CASE.

Inasmuch as the case is here on plaintiff's demurrer to the further answer and new matter affirmatively pleaded in defendants' answer, the facts are brief and will be found in that pleading.

AMENDED COMPLAINT.

The amended complaint which sought to restrain defendants from expending municipal funds alleged that plaintiff is a taxpayer of the defendant municipality. Plaintiff denominated the capacity in which he brought suit as "Emery Valentine, for himself and all other taxpayers of the City of Juneau, Alaska" (P. R. p. 1), and alleged that he and all other taxpayers would receive and suffer irreparable injury and loss and damage by defendants' alleged acts, unless the latter were restrained, and that they were without other remedy (P. R. p. 6) but there was no allegation that he brought the suit except on his own behalf.

ANSWER.

To the amended complaint, the defendants filed an answer, which, after generally denying the allegations of the amended complaint, alleged by way of new matter and an affirmative defense: the municipal existence of Juneau, the election and qualification of its mayor and six councilmen; and "that the defendant R. E. Robertson is the acting city attorney" for said municipality (P. R. pp. 24, 25); the position of the city as a commercial center through which business is carried on with outlying towns and camps; the building of a wharf by the city, as it was authorized to do, and the expenditure of a large amount of money equipping said wharf for conducting the wharfage business; the increase of said business by the improvement of and aids

to navigation (P. R. p. 25); the ownership by the city of all streets within the municipality and its duty to keep them in repair (P. R. p. 25), "that for a long time past the city of Juneau has built its streets out of 3-inch planking; that it has become impracticable, owing to the large number of automobiles in use in said city and to the rise of labor and material, to continue the method heretofore employed in building and improving streets, that permanent streets now have to be built necessitating the expenditure of a large amount of money, which the city of Juneau is unable to do unless it is authorized and empowered to issue bonds for said purpose; that it is necessary among other things, before it can issue said bonds, to have an act of Congress authorizing the issuance of said bonds, that a bill has been prepared and introduced into the Congress of the United States by the Delegate from Alaska, which bill, if it becomes a law, will give the City of Juneau said authority; that it is necessary, in order to secure the passage of said bill, to have a person who is conversant with the facts appear before the committees of Congress to explain the facts to said committees and work in conjunction with the Delegate from Alaska to secure the passage of said bill authorizing said issuance of bonds." (P. R. pp. 25, 26); that the citizens of Juneau and of Southeastern Alaska, generally, had been advocating, prior to January 18, 1924, the sending of persons to Washington, D. C., to advocate certain legislation in con-

nection with certain projects, an enumeration of which is contained in the resolution passed by the Juneau municipal council on January 18, 1924; that the defendant Robertson, who was well qualified and in possession of the necessary facts to represent said citizens in Washington, D. C., had been chosen by some of the citizens as one of the persons to make said trip (P. R. p. 26), that the defendant municipality was interested in many of said projects and that the consummation of many of them would be of great benefit to said municipality generally, and particularly in connection with its ownership of its wharf and facilities, and that the municipal council, considering said benefits, endorsed said various projects (P. R. pp. 26, 27); that the defendant Robertson consented to act for the defendant municipality in connection with the passage of the bill allowing said municipality to issue bonds for street improvement and to use his best endeavors before the Congressional committees by explaining the facts to them and the needs of the municipality in that connection if the municipality would pay said Robertson's expenses in going to Washington (P. R. p. 27), that on January 18, 1924, the defendant municipality's common council passed a resolution (P. R. pp. 30-38) setting forth the attitude of the city in regard to said several projects and appropriating $2,000.00, or so much thereof as was necessary, to defray said Robertson's expenses to Washington and return, in representing said municipality in

connection with the bill authorizing the municipality to issue bonds for street improvement purposes (P. R. pp. 27, 28), that the defendant municipality derives its revenue (a) from real and personal property taxation, (b) from revenue and profit made by its city dock and facilities, (c) from license taxes imposed by it, (d) from police fines imposed by it, and (e) from license taxes collected by the Federal Government from businesses conducted within the municipality, that the monies in the city treasury were derived from said sources, and that the appropriation and payment of the monies under said resolution were out of the monies in the municipal treasury derived from said various sources, which monies had not theretofore been appropriated or set aside for any purpose whatsoever, and that said appropriation and payment would not necessitate said municipality's levying a special tax or increase the tax levy for the current year (P. R. p. 28), that on January 19, 1924, pursuant to said resolution, the mayor of the defendant municipality duly and regularly issued a warrant in favor of the defendant Robertson in the sum of $1,500.00, which warrant was countersigned by the city clerk; that on January 21, 1924, the City Treasurer, the defendant Behrends, paid said defendant Robertson said $1,500.00 (P. R. pp. 28, 29).

DEMURRER.

To defendants' further and affirmative answer, plaintiff filed his demurrer upon the ground that

the same does not state facts sufficient to constitute any defense or counterclaim to plaintiff's amended complaint. (P. R. p. 38).

A hearing was had upon plaintiff's demurrer, which the Court overruled by its order of February 9, 1924 (P. R. pp. 39, 40), rendering and filing on the same date its written opinion (P. R. pp. 41-56.)

PLAINTIFF'S REFUSAL TO PLEAD OVER.

Thereupon, in open Court, plaintiff announced that he stood upon his demurrer and would not reply or plead over (P. R. p. 57, Appellant's Bf. p. 12), whereupon the Court entered its judgment and decree vacating the temporary restraining orders and injunctions and that the plaintiff take nothing by his action. (P. R. pp. 57, 58.)

As is disclosed in the trial court's opinion (P. R. p. 43), the demurrer filed to the amended complaint was also overruled, but no appeal was taken therefrom.

RESOLUTION OF JANUARY 18, 1924.

Before discussing the law applicable to the case, we wish to stress the fact that in our opinion neither the allegations of the amended complaint nor the fact as to whether or not they have been met by the answer are material at this time. We also contend that it is immaterial as to what record was originally, or in the first place, made of the proceedings of the

Common Council and of its resolution of January 18, 1924, because the Common Council itself found (P. R. p. 32) that the record first made of those proceedings was indefinite, inaccurate, uncertain, omitted an important part, and failed to clearly state the proceedings. The correct record of the proceedings of January 18, 1924, appears in the record made on January 29, 1924. This seems clear to us from Exhibit "A" (P. R. pp. 32-38), but in view of appellant's analysis of that resolution (Appellant Bf. pp. 9-12, 21-25), we feel it proper to distinctly differentiate (a) the resolution as passed from (b) the record made of that resolution. Our contention under the admitted facts is that the correct record of the actual resolution is found in Exhibit "A," commencing with the tenth line P. R. p. 32, and continuing through to page 38, and that the incorrect record of the resolution is found in Exhibit "A," commencing with the twenty-first line, P. R. p. 30, and continuing down and to the third line P. R. p. 32. This incorrect record of the resolution is quoted by appellant in his brief page 22. With this explanation, we earnestly submit that there was only one resolution, viz., the resolution of January 18, 1924, but that that resolution was recorded in the minutes of the City Council twice, namely: once incorrectly on January 18, 1924, and later, correctly, on January 29, 1924. We specifically challenge the statement (Appellant's Bf. p. 5) that the answer generally admitted the substantial allegations of the com-

plaint, and that the answer (Appellant's Bf. p. 6) does not deny paragraphs 9 and 10 of the amended complaint, and that the defendant's affirmative defense simply restates and affirms the allegations of the amended complaint but in different language.

ARGUMENT.

At the outset it is perhaps proper, in view of the wide departure by appellant in his brief from that course, to point out that the channel in which are to be found the facts before the Court consists of the further answer and new matter, which the defendants affirmatively set up in their answer under Sec. 895, Compiled Laws of Alaska 1913, which provides:

> "Sec. 895. The answer of the defendant shall contain—
>
> "First: A general or specific denial of each material allegation of the complanit controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.
>
> "Second: A statement of any new matter constituting a defense or counterclaim in ordinary and concise language without repetition."

To that further answer and affirmative matter (P. R. pp. 38, 39), appellant demurred under Sec. 900, C. L. A. 1913, which provides:

> "Sec. 900. The plaintiff may demur to an answer containing new matter when it appears upon the face thereof that such new matter does not constitute a defense or counterclaim, or he may, for like cause, demur to

one or more of such defenses or counterclaims and reply to the residue."

The plaintiff thus admitted the facts, so far as well pleaded, in the further answer and new matter of the defendants' answer, but said that they were not legally sufficient to constitute a defense.

31 CYC. 269, 270.

Plaintiff's contention then must be confined to the facts alleged in defendants' further answer and new matter. His position necessarily is that he admits those facts are true but contends that they are not legally sufficient to authorize the expenditure of municipal funds for the purposes and in the manner as alleged, not in the amended complaint, but in such further answer.

The first question then is "Did the defendant municipality have the power to authorize the appropriation and expenditure of money in the manner alleged in defendants' further answer and for the purpose of sending to Washington, D. C., its attorney to explain to the committees of Congress the necessity of the municipality's being permitted to issue bonds for the purpose of raising the funds necessary to enable it to build necessary permanent streets?"

That perhaps would be the only question had not the appellant injected into the controversy on appeal the allegations of his amended complaint. By reason thereof, the second question arises, "Can the plaintiff maintain this action?"

UPON THE DEFENDANT MUNICIPALITY IS IMPOSED THE DUTY TO LOCATE, CONSTRUCT AND MAINTAIN STREETS, TO KEEP THEM IN REPAIR AND, WHEN NECESSARY, TO BUILD PERMANENT STREETS.

Appellant's demurrer to defendants' further answer and new matter admitted that the defendant municipality built a city wharf and spent a large amount of money equipping said wharf with facilities for conducting said wharfage business (P. R. p. 25), and that the revenue and profit made by said dock and facilities is one source of the municipality's revenues as well as of the moneys from which was made the appropriation whereof plaintiff complains (P. R. p. 28). This, we respectfully submit, is tantamount to an admission that the defendant municipality owns and operates a municipal dock or wharf with facilities for the wharfage business. In the allegation "that the improvement of and aids to navigation greatly increased the business done by the city or its said wharf" (P. R. p. 25), is also found a tacit admission of the benefits to the defendant mnuicipality of the several improvements of and aids to navigation in territorial waters which were endorsed as appears by the Common Council's resolution (P. R. pp. 30-38), while in the allegation "that the consummation of many of said projects would be of great benefit to the City of Juneau, generally, and particularly in connection with the city's own-

ership of its wharf and facilities" (P. R. p. 26), is an express admission of those benefits as well as of said ownership.

Plaintiff has also admitted the defendant municipality's ownership of the streets, the reasons and the necessity for the improvement of the streets and for the building of permanent streets and that such street work will necessitate the expenditure of a large amount of money (P. R. p. 25).

The two allegations that the city was authorized to build its said city wharf and that it is the city's duty to keep said streets in repair (P. R. p. 25) are in consonance with the third paragraph of Sec. 12, Art. III, Ch. 97, Alaska Session Laws 1923, which reads as follows, viz.:

> "Sec. 12. General Authority of Council. The council shall have and exercise the following powers:
>
> * * * * * *
>
> "Third: To provide for the location, construction and maintenance of the necessary streets, alleys, crossings, sidewalks, sewers, wharves, aqueducts, dikes and water courses and to widen, straighten, strengthen or change the channels for streams and water courses."

Surely the appellant will not gainsay that this statute not only authorizes the defendant municipality to own, build and maintain its wharf or dock but also imposes upon it the duty to keep its streets in at least a reasonable state of repair as well as authorizing it to construct and maintain permanent streets.

Appellant's rather sharp, indeed almost disparaging, criticism of the opinion of the learned trial judge, we submit is not justified by the record herein; in fact, analysis discloses that appellant's criticism of that portion of the opinion (P. R. p. 49), quoted by appellant in his brief (Appellant's Bf. bottom p. 16, top p. 17), is based entirely upon the omission of the word "acting" before the words "City Attorney" and the inclusion therein of the clause "and as such acts in a legal advisory capacity to the City Council." Against the remainder of this quoted excerpt from the opinion, which as disclosed by the opinion itself (P. R. p. 49) is a "boiled down" restatement of the previous substantial statement (P. R. p. 48), the appellant can have no grievance unless it be because, in his brevity, the trial court omitted a condensed statement of the allegation (P. R. p. 26), appearing in defendant's further answer "that it is necessary, in order to secure the passage of said bill, to have a person conversant with the facts appear before the committees of Congress, etc." Even the omission of the word "acting," assuming but not conceding that the learned trial court, as intimated by appellant, intentionally omitted it, could not, were it material, injure appellant as only on the preceding page of the opinion (P. R. p. 48) the court in making a statement, which he denominated as "in substance" used the exact language of the defendants' pleading, i. e.: "Robertson is the acting city attorney" (P. R. p. 25; Op., P. R. p. 48). This stricture

upon the trial court's having thereby, as appellant claims, misstated the facts (Appellant's Bf. p. 17), seems to be entirely hypercritical. But appellant is not content therewith. The Court is subpected to further criticism for the use of the clause "and as such acts in a legal advisory capacity to the City Council." There can be no contravention of the admission that the defendant "Robertson is the acting city attorney" (P. R. p. 25), hence, under the statute, Sec. 23, Ch. 97, Alaska Session Laws 1923, quoted by appellant (Appellant's Bf. p. 45), he was the legal advisor of the Council and other officers of the city, or, in the language of the trial court, "and as such acts in a legal advisory capacity to the city." We submit that the admitted fact that the defendant Robertson "is the acting city attorney" includes the deduction that he acts in a legal advisory capacity to the City Council. Upon such hypercriticism, appellant boldly asserts that the lower court went outside the record, and that he, appellant, shall also do so, and he thereupon does do (Appellant's Bf. p. 18.) Later (Appellant's Bf. p. 26) he again does so, and states "There are a great many persons in Juneau who disagree with that statement of the matter, and the record does not justify the conclusion." The cause of this assertion of appellant's is found in the Court's statement that Robertson "is not seeking to influence Congress for the private benefit of any person or class of persons." (P. R. p. 51). The Court made that statement to disclose some of the

features in which the instance case could be distinguished from the void agreement spoken of in the case of *Trist v. Child*, 21 Wall. 441, 445, and at the same time to show that this case was within the sanction of the language of the U. S. Supreme Court in that case. We are content to challenge the production of anything in the record upon which a finding can be based or a deduction reached that the defendant Robertson "was seeking to influence Congress for the private benefit of any person or class of persons, or that he was to represent anyone whosoever for any purpose whatsoever other than the defendant municipality for public municipal purposes."

From his brief (Appellant's Bf. pp. 19 to 25) we gather that appellant contends that the resolution of the Common Council, exhibit "A" (P. R. pp. 30 to 38), discloses that the defendants were dominated by some sinister or ulterior object. We regret that we are unable to see the basis of such deduction by appellant, but we confidently urge that that exhibit shows clearly that only one resolution was passed by the Common Council, i. e., on January 18, 1924, and that the meeting of January 29, 1924, was simply to correct the record of that resolution. It seems to us that our contention is substantiated by the exhibit itself, i.e.: "And whereas said resolutions as placed upon the minutes are indefinite, inaccurate, uncertain, omit an important part, and fail to correctly state the proceedings of the common council, it is moved by

Councilman Connors that the resolutions be corrected to read as follows." (P. R. p. 32). If the defendant thought the evidence would disclose the contrary he would not have admitted by his demurrer the allegation in defendants' further answer, viz.: "That on the 18th day of January, 1924, the Common Council of the City of Juneau, Alaska, passed a resolution * * * *, a copy of which resolution is attached hereto, marked Exhibit 'A,' and made a part hereof," (P. R. pp. 27, 28). Surely if such contention were seriously considered by him, appellant would have challenged such allegation by pleading over instead of standing upon his demurrer.

To fix upon the defendant Robertson's duties or employment the odious cloak of lobbyist, thus to insure the defendants' acts to fall with the censure of public policy, appellant needs must resort to his own pleading, i. e.: amended complaint (P. R. pp. 19, 20), whereas the facts, from which the nature of those duties or employment must necessarily, we submit, be drawn, are to be found in the admitted allegations of defendants' further answer and new matter. It is not our understanding that appellant, conceiving that the facts admitted by his demurrer are too prejudicial to him, can now at this late hour assert that the defendants have admitted the allegations of his amended complaint. The further answer and new matter clearly disclose that no one contemplated that the defendant Robertson was to use personal solicitations or to

exercise or attempt to exercise personal influence or improper or corrupt methods either in Congress or with any member of Congress. On the contrary the admitted facts are that "It is necessary, in order to secure the passage of" the bill, by which the defendant municipality could issue bonds so as to raise the necessary funds for the required permanent streets, "to have a person who is conversant with the facts appear before the committees of Congress to explain the facts to said committees and work in conjunction with the delegate from Alaska to secure the passage of said bill authorizing said issuance of bonds," (P. R. p. 26), and that the said defendant "Robertson consented to act for the City of Juneau in connection with the passage of the bill allowing the City of Juneau to issue bonds for street improvement and to use his best endeavors before the committees of Congress by explaining the facts to them and the needs of the City of Juneau in this connection" (P. R. p. 27). The record also admittedly discloses that the defendant Robertson was in no wise to profit by the services that he was to render but that he was to render those services "If the City of Juneau would appropriate sufficient money to pay his expenses in going to Washington," (P. R. p. 27).

Other pertinent admitted facts are: That the defendant municipality derives its revenues from five different sources, viz.:

> Taxation of real and personal property;
>
> Revenues and profits made by its municipal wharf and facilities;
>
> License taxes imposed by it;
>
> Police fines imposed by it;
>
> License taxes imposed and collected by the Federal Government from businesses conducted within the municipality.

And that the money used in payment of the defendant Robertson's expenses to Washington was derived not alone from real and personal property taxes but from these various sources, that this money had not heretofore been appropriated or set aside for any purpose, and that the appropriation and expenditure of the money would not necessitate a special tax or increase the tax levy for the current year. All these facts are clearly alleged in defendants' further answer and new matter. (P. R. p. 28).

In addition to the unequivocal admission of these facts there are several statutory provisions which may be aptly considered with them. The law is specific that the defendant municipality must obtain Congressional authorization before it can bond itself, i.e.:

> "* * * * * nor shall the territory, or any municipal corporation therein, have power or authority to create or assume any bonded indebtedness whatever, nor to borrow money in the name of the territory or of any municipal division thereof; * * * * *."

Sec. 9, Act. Aug. 24, 1912, 37 Stat. L. 512, Sec. 416, C.L.A. 1913.

The Territorial Legislature has also prohibited the municipality from issuing bonds, i.e.:

"Sec. 13. The City Council shall have no authority to issue bonds or incur any bonded indebtedness, nor shall they have authority to incur a greater indebtedness or liability, etc."

Art. III, Ch. 97, Alaska Session Laws 1923.

Inasmuch as we have seen that the City Council has authority to provide for the location, construction and maintenance of wharves (Sec. 12, Subpar. 3, Art. III, Alaska Session Laws 1923, supra), we believe there will be no contradiction that it has a right to make a revenue and profit therefrom. This assumption is further supported by the 4th subparagraph, Sec. 12, Art. II, A.S.L. 1912, which authorizes the city to maintain public utilities.

The City Council is authorized to levy and collect a poll tax (Subp. 7, id.), to levy a dog tax (Subp. 8, id.), to impose license taxes on auctioneers, itinerant vendors, etc. (Subp. 14, id.), through which another one of the sources of revenue is accounted for.

The imposition and collection of police fines is authorized by Subp. 12, id.; thus accounting for one more of the sources of revenue.

The other source of revenue, occupational licenses collected by the Federal Government, is

derived by reason of the payment under Sec. 630, C.L.A. 1913, 30 Stat. L. p. 1336, 32 Stat. L. 946, of the licenses on businesses within the municipality under Sec. 2569, C.L.A. 1913, 31 Stat. L. 331, and Sec. 259, C.L.A. 1913, 34 Stat. L., 478.

These statutes show that the defendant municipality may legally derive revenue from the several sources of municipal revenue admitted by the record.

SERVICES IN EXPLAINING TO CONGRESSIONAL COMMITTEES THE NECESSITY OF A MUNICIPALITY'S ISSUING BONDS SO AS TO ENABLE IT TO RAISE FUNDS WITH WHICH TO BUILD NECESSARY PERMANENT STREETS ARE NOT LOBBYING SERVICES, AND AN AGREEMENT FOR THE PERFORMANCE THEREOF IS NOT VOID AS AGAINST PUBLIC POLICY.

Appellant's argument is based upon the assumption that the agreement between the defendant municipality and the defendant Robertson is a lobbying contract, and he states that "it is the contract we are criticising and not Mr. Robertson," (Appellant's Bf. p. 27). His fears apparently arise not out of what the defendant Robertson may do but out of what he claims that defendant is clearly permitted to do. He is afraid that some vicious precedent will be established which may be taken advantage of in the future by an avowed lobbyist. To us, his fears seem groundless not only in mind

but also in the record, as by his standing on his demurrer he has admitted that all that the defendant Robertson is to do "is to act for the City of Juneau in connection with the passage of the bill allowing the said City of Juneau to issue bonds for street improvement and to use his best endeavors before the committes of Congress by explaining the facts to them and the needs of the City of Juneau in this connection," (P. R. p. 27). Turning back, we find that it is also admitted "that it is necessary, in order to secure the passage of said bill, to have a person who is conversant with the facts appear before the committees of Congress to explain the facts to said committees and work in conjunction with the Delegate from Alaska to secure the passage of said bill authorizing said issuance of bonds," (P. R. p. 26).

True, indeed, the defendant Robertson might have undertaken to so act for the defendant municipality, yet upon his arrival in Washington he might have committed a murder or a burglary with the ill conceived idea of thereby in some way of securing the passage of a street bonding bill for the City of Juneau. But, the record shows no premise from which to deduce such fact, nor does the record afford any foundation for the theory that he intended to use personal solicitations, or to exercise personal influence or improper or corrupt methods, for the purpose of securing the passage of the bill. If appellant deemed that the defendant Robertson did not intend to abide by the

agreement with the municipality or intended to exceed his authority or that there was a secret understanding by which he was to do some of the things which make a lobbying contact void as against public policy, then we again submit that appellant instead of standing on the record and admitting that none of those things were intended to be done by any of the defendants, should have denied defendants' further answer and new matter.

Those things however are part of the essentials of a lobbyist.

> "To 'lobby' is for a person not belonging to the Legislature to address or solicit members of a legislative body, in the lobby or elsewhere, *away from the house*, with a view of influencing their votes. Webst. Dic."
>
> *Chippewa V. & S. R. Co. v. C. St. P. M. & O. R. Co.* 75 Wis. 224, 44 N.W. 17, 6 L.R.A. 601 at 609.

The Courts have even given a more limited definition than the one just quoted, viz.:

> "Lobbying services are generally defined to mean the use of personal solicitations, the exercise of personal influences and improper or corrupt methods, whereby legislative or official action is to be the product. A contract for such services is void, and cannot be enforced. *Dunham vs. Hastings Pavement Co.* 56 App. Div. 244, 67 N. Y. Supp. 632-634; *Trist v. Child*, 88 U. S. (21 Wall.) 441-448, 22 L. ed. 623, *Oscagan vs. Arms Co.* 103 U. S. 261, 22 L. ed. 539."
>
> *Burke v. Wood*, 162 Fed. 533, 537, 541.

In the case of *Chippewa Valley & S. R. Co. v.*

Chicago, St. P., M. & O. R. Co. supra, the Wisconsin Supreme Court quite fully reviewed the cases relative to contracts which had been condemned as being void and against public policy. An examination of the cases reviewed by that Court reveals that nearly all of those cases, in fact, we believe it can be safely asserted, all of them, show that the agent was to receive compensation for his services. In many of those cases, the compensation was even contingent upon success. That Court stated that:

> "Where the principal object and purpose of an agreement is to secure, by a promise of compensation contingent upon success, influence upon or with members of a Legislature, or executive or other public official, it is none the less vicious in its tendencies because it is therein stipulated that such influence shall be 'reasonable and proper.' The precise point is that such agreement, for such purchase of influence, is against public policy, and therefore improper.
>
> "There is another consideration which has generally made courts more emphatic in condemnation of such contracts, and that is that the agreement for compensation is made contingent upon the success of the legislation or other object sought."

6 L. R. A., 608, 609.

But that Court did not change its prior concession that an agreement for compensation for certain services in securing the passage of an act, as, for instance, making a public argument before a committee at the Legislature, or before the Leg-

islature itself, if permitted to do so, might be enforced. See Page 607, id.

While it has often been decided that an agreement for the sale of influence and exertions of a lobby agent to bring about the passage of a law, without reference to its merits, for a consideration, is void against public policy, yet, those cases by no means hold that no person can appear either by himself or by his counsel and lay a lawful matter before a Legislature.

In summing up the previous cases on this question, the U. S. Supreme Court in *Marshal v. B. & O. R. Co.*, 57 U. S. 314, 16 How. 314, 14 L. ed. 953, at 963, said:

> "The sum of these cases is, 1st. That all contracts for a contingent compensation for obtaining legislation, or to use personal or any secret or sinister influence on legislators, is void by the policy of the law.
>
> "2d. Secrecy, as to the character under which the agent or solicitor acts, tends to deception, and is immoral and fraudulent, and where the agent contracts to use secret influences, or voluntarily, without contract with his principal, uses such means, he cannot have the assistance of a court to recover compensation.
>
> "3d. That what, in the technical vocabulary of politicians is termed 'log-rolling,' is a misdemeanor at common law, punishable by indictment."

But that Court in the same decision at page 962, id., also painstakingly pointed out that:

> "All persons whose interests may in any way be affected by any public or private act of the Legislature, have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, before legislative committees, as well as in courts of justice. But where persons act as counsel or agents, or in any representative capacity, it is due to those before whom they plead or solicit, that they should honestly appear in their true characters, so that their arguments and representations, open and candidly made, may receive their just weight and consideration. A hired advocate or agent, assuming to act in a different character, is practicing deceit on the Legislature. Advice or information flowing from the unbiased judgment of disinterested persons, will naturally be received with more confidence and less scrupuluosly examined than where the recommendations are known to be the result of pecuniary interest, or the arguments prompted and pressed by hope of a large contingent reward, and the agent 'stimulated to active partisanship by the strong lure of high profit.' Any attempts to deceive persons intrusted with the high functions of legislation, by secret combinations, or to create or bring into operation undue influence of any kind, have all the injurious effects of a direct fraud on the public."

Not only in the case just referred to but in the subsequent case of *The Providence Tool Co. v. Norris*, the compensation of the lobbyist was contingent upon success. In the latter case, the U. S. Supreme Court specifically said:

> "Agreements for compensation contingent upon success, suggests the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion

of evil, and strikes down the contract from its inception."

69 U. S. 45, 2 Wall. 45, 17 L. ed. 868 at 871.

Again, in the case of *Trist v. Child*, wherein the compensation was contingent upon success, the Supreme Court specifically announced that certain services, i.e.: the identical kind of services which the record discloses, we submit, were to be performed by the defendant Robertson, are entirely legal:

"We entertain no doubt that in such cases, as under all other circumstances, an agreement express or implied for purely professional services is valid. Within this category are included: drafting the petition to set forth the claim, facts, preparing arugments, and submitting them orally or in writing, to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable."

Trist v. Child, 88 U. S. 441, 21 Wall. 441, 22 L. ed. 623 at 624.

The Court also stated at pp. 624, 625, id., that such services were to be distinguished from personal solicitation, viz.:

"But such services are separated by a broad line of demarcation from personal solicitation, and the other means and appliances which the correspondence shows were resorted to in this case. There is no reason to believe

> that they involved anything corrupt or different from what is usually practiced by all paid lobbyists in the prosecution of their business."
>
> 624, 625, id.

The trial Court cited *Trist v. Child, supra*, as clearly showing the validity of the employment in the case at bar. We challenge the appellant to point out a single fact that brings the case at bar within the condemnatory language of the Supreme Court in that case wherein it said:

> "The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate and, considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy." 625, id.

Admittedly, the defendant Robertson was in no wise to benefit by the success or lack of success that crowned his efforts. He consented to act for the City of Juneau "if the City of Juneau would appropriate sufficient money to pay his expenses in going to Washington and return." (P. R. p. 27.) He, clearly, was not to receive any compensation in the ordinary sense of that word. He had no pecuniary interest at stake. He was not seeking to assist the passage of any bill for the benefit of any private person. The agreement was in no wise contingent upon success. He was to receive no pay for his services, and the U. S. Supreme Court has said, not, as inadvertently misquoted by the

appellant in his brief, on page 31, that "the taint lies in the stipulation," but:

> "The taint lies in the stipulation for pay." *Trist v. Child*, 22 L. ed. 625.

The principle, that a contract for services either to cause or prevent legislative action when such services consist of publicly presenting the subject before the Legislature or some of its committes, is not void as against public policy, is clearly announced in the foregoing cases as well as in the cases of:

> *Sweeney v. M'Leod*, 15 P. (Ore.) 275, 279.
> *Powers v. Skinner*, 34 Vt. 274.

Sufficiently has it been shown that this case does not properly present any question of contemplated lobbying services and that the cases which most strongly condemn contracts for services of a lobbyist emphatically distinguish such contracts from those where the services to be performed are of the nature contemplated by the defendants.

The Common Council, as seen, has specific authority to locate, construct and maintain the necessary streets, alleys, crossings, sidewalks, sewers, wharves, etc. (Subp. 3. Sec. 12, Art. 3, Chap. 97, Alaska Session Laws 1923, supra.) It is also admitted that permanent streets are necessary, but that they can not be built unless the city issues bonds to raise the money and that it is necessary, before issuing the bonds, to have Congressional authorization therefor, and that such authorization

can not be procured without having a person conversant with the facts appear before the Congressional committees, explain the facts to them and work in conjunction with the Delegate from Alaska. (P. R. pp. 25, 26.)

These allegations, to disgress for a moment, we submit, plainly evidence not that the defendant municipality was seeking in any wise to usurp the powers of the Delegate from Alaska, but was only seeking to work in conjunction with him. It can be conjectured that the Territorial Delegate, regardless of his representation of the entire Territory, might not be conversant with the facts as to the necessity of permanent streets for the defendant municipality and that he might be very willing to have the assistance of the municipality's representative in securing requisite legislation therefor. But to revert to the admitted facts and law—from them it not illogically follows that the Common Council had authority to incur such expenses as it might deem necessary to enable it to perform its duty relative to streets and wharves. That defendant Robertson is admitted to be the acting city attorney is perhaps of no particular importance. No doubt the Common Council could have acted, if it had seen fit, through any other agent or representative. There is no foundation for appellant's deduction that the money was appropriated for the other projects set forth in Exhibit "A." Those projects were simply endorsed by the Common Council. That body thereby stated

that in its judgment all those projects were beneficial to the defendant municipality. Certainly none of them are of a political nature except the project for dividing the Territory of Alaska, unless it can be said that any project requiring Congressional authority is of a political nature. In one respect that is, of course, true, but we submit that the defendant municipality's desire to construct permanent streets, coupled with its inability to finance such a proposition except by an issue of bonds for which it must first receive the authority of Congress, does not make a proposal to construct permanent streets into a political proposition. All of the projects mentioned can just as well be conjectured to be of benefit to the municipality as of detriment to it. They might well increase the revenues and profits of the municipality's wharf which it is authorized to operate. The municipality could legally have a keen interest is such projects, both from the standpoint of proprietorship and from that of a municipal sovereign. Indeed, it is admitted that the consummation of these projects would be of great benefit to the defendant municipality. (P. R. pp. 26, 27.)

THE MUNICIPALITY OF JUNEAU, ALASKA, HAS AUTHORITY TO APPROPRIATE AND EXPEND MONEY OUT OF ITS TREASURY FOR THE PAYMENT OF THE EXPENSES OF ITS ATTORNEY IN MAKING A TRIP TO WASHINGTON, D. C., TO EXPLAIN

TO CONGRESSIONAL COMMITTEES THE NECESSITY OF THAT MUNICIPALITY'S BEING PERMITTED TO ISSUE BONDS WITH WHICH TO RAISE FUNDS NECESSARY TO ENABLE IT, IN THE PERFORMANCE OF ITS DUTY, TO BUILD NECESSARY PERMANENT STREETS.

The learned trial Court's opinion is so clear that we think there is little need to attempt to throw further light upon the question. As in the ably and logically decided case of *Meehan, et al. v. Parsons, et al.*, 271 Ill. 546, 111 N.E. 529, extensively quoted by the trial Court, so in this case there is nothing to warrant the deduction that the defendant Robertson was to receive any compensation contingent upon the obtaining of the desired legislation. On the contrary, it is definitely and clearly conceded that he was to receive only his expenses in going to and from Washington. There is nothing to evidence that he had any personal interest in the outcome of his efforts, or that he personally would be either benefitted or damaged by any possible Congressional action.

Also, as in the Iowa case of *Dennison v. Crawford Co.*, there is nothing herein which tends to show that the defendant Robertson used or intended to use any means except such as were calculated to appeal to the reason and judgment of the Congressional committees as a body. This case, indeed, is stronger than the Iowa case as the facts

here specifically show that the defendant Robertson was to receive no compensation and that further he was only to appear before committees of Congress (P. R. pp. 26, 27). The Iowa case covered a contract between a county and an agent which provided that the latter should be authorized to make the proper applications to the general government for its swamp lands, or indemnity therefor, and that he was to receive one-half of what he thus procured for his services. To effect the object of his contract, certain Congressional action became necessary which he aided in procuring by legitimate means. The Court held that:

> "It was perfectly competent for the County to employ agents or attorneys for this purpose, and an agreement to pay them therefor is valid. Such agents may lawfully draft 'the petition to set forth the claim, attend to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced.' *Swayne, J., in Trist v. Child*, 21 Wall. 441."
>
> *Dennison v. Crawford Co.*, 48 Iowa 221, 215.

See also *Sun Printing & Publishing Ass'n. v. New York*, 157 N. Y., 257, 265, 46 N.E. 499 at 500, wherein it was further held that:

> "Common highways have always been regarded as under the special care, supervision, and control of municipal governments, upon which devolves the duty of keeping them in

> suitable repair, as well as the duty of providing sufficient ways to satisfy the requirements of the public."

A very logical exposition of the law, which we submit is applicable to this case, is to be found in the case of In re Taxpayers and Freeholders in the Village of Plattsburg, 50 N. Y. Supp., 356 at 365, 366. This case was later affirmed in 51 N.E. 512, and the language of the court there at page 515 is not inapplicable by way of analogy as showing, if it were conceded, for the sake of argument, that the defendant municipality had no specific statutory authority for the appropriation of funds for the purpose in question, that inasmuch as there is imposed upon it the duty to construct and maintain streets, then necessarily it must take such necessary steps as in the discretion of its Common Council are necessary for it to be able to perform that duty. However, to the decision found at pages 365 to 366 of 50 N. Y. Supp., we specifically refer. The Court therein said:

> "The board of trustees, by subdivision 20, Chap. 5, tit. 4, is authorized 'to employ an attorney and counsel when the business of the board of trustees or the village requires, either by the year or otherwise, and to pay him a reasonable compensation.' Under this provision of the statute, had the trustees power to employ counsel to appear before committees of the Legislature and the Governor in relation to any law or laws pertaining to the village? The general care of municipal affairs is entrusted to the officers of the municipality, and the initiating and providing for public im-

provements, or proposed public improvements, I think is within their province. While individual citizens are not barred from setting them on foot, but should be encouraged to do so, yet in the nature of things, they are left very largely to the municipal authorities; and, even when initiated by the enterprise or intelligence of the citizen, his first effort is to put the municipal officers in motion, and, if they find that their powers in that respect are limited or entirely withheld by the statute, it is perfectly proper for them to apply to the legislative power of the State for authority. This power or right, it seems to me, is incident to the general powers of government conferred upon them. The presentation of the merits of bills, or the necessity or propriety of legislation to committees of the Legislature and to the Governor, is legitimate employment for attorneys and counsel. It is a matter that requires skill and address.

"The presentation and preparation of bills to the Legislature by and on behalf of municipal authorities, to bring about needed or supposed needed improvements, or to obtain further powers for the making of public improvements, as well as opposing the passage of bills believed by municipal authorities to be inimical to the interests of the municipality, is of constant occurrence of late years; and some of the larger municipalities of the State keep some representative from the law department of such municipality in almost constant attendance upon the session of the Legislature, presenting and explaining to the Legislature bills proposed and legislation asked for by the municipality, and watching legislation prepared by others, and calling the attention of the Legislature to proposed improvident or unnecessary acts of legislation affecting their respective municipalities; and I think such

watchfulness over legislation prepared by others, and such attention to and furtherance of that which is deemed needful by the municipal authorities, has come to be regarded as a very proper, and, indeed, necessary, part of the functions of the law department of a city. There is no specific authority given authorizing them to send their law officers to attend upon the Legislature, or to pay their expenses for so doing; but it is regarded, and I think fairly so, as incident to the power and purposes of the municipality. It seems to me, therefore, that in this case, the village having the power to employ counsel 'when the business of the board of trustees of the village requires' it might legitimately employ them for the purpose heretofore specified, and their 'reasonable compensation' for such service would be a legal claim against the village."

In re Taxpayers & Freeholders of the Village of Plattsburgh, 50 N. Y. Supp. 356, 365-366.

See also:

Bachelder v. Epping, 28 N. H., 354.
Arthur v. Dayton, 4 Ky. L. Rep. 831.

The foregoing authorities clearly show the distinction between services which may be properly rendered in presenting matters to a Legislature and services which contemplate the use of personal solicitations, the exercise of personal influences and improper or corrupt methods. It will not be amiss to call attention to the distinguishing marks of some of the cases cited by appellant.

In the case of *Burke v. Wood*, 162 Fed. 533, at 451, the Court specifically said, "I think the evidence abundantly shows that the plaintiff solicited

members of the Council in the lobby or precincts of their place of assembly and elsewhere, with the purpose of influencing their votes in support of a measure to purchase the ..... works; that he personally solicited their votes in that behalf and exerted an influence over them in their legislative action in the premises." Very properly we submit the Court found that such services were lobbying services, but as we have many times pointed out there is nothing in this record to indicate that any such services were contemplated to be performed by the defendant Robertson.

In neither the case of *Manhattan Trust Co. v. Dayson*, 59 Fed. 327, nor in the case of *Washington Irr. Co. v. Krutz*, 119 Fed. 279, were there any services involved which make those cases analogous to the case at bar. We have no fault to find with the general principles of law quoted by the appellant from those cases, but call attention to the fact that the judgment in the last named case was in favor of the plaintiff Krutz.

The case of *James v. City of Seattle*, 62 Pac. 84, is entirely different from this case. The Court therein specifically stated that the expenditure could not be regarded as necessarily essential for municipal purposes. There is nothing in that case to indicate that, if the City of Seattle had appropriated money to send its city engineer to another city for the necessary purpose of making examinations of street work there such would not have been a lawful expenditure.

In the case of *State v. Superior Court*, 160 Pac. 755, the Port Commissioners with city funds were apparently conducting a political campaign. The direct appeal which they were making to voters would be very analogous to personal solicitations of members of a Legislature. They were trying to prevent the port's powers being limited. If the Juneau City Council were attempting to secure or prevent the enactment of legislation that would decrease or increase their members, the cases might have some possible analogy. Here, however, the municipality was seeking to raise the necessary funds for the construction of necessary permanent streets that it can not build except through a bond issue which bonds can not be issued until authorized by Congress.

In *Fields v. City of Shawnee*, 54 Pac. 318, the defendant was not trying to carry out any duty imposed upon it by the Legislature. In fact, the Court therein stated that it thought that the expenditure was expressly prohibited by reason of a Congressional act which prevented the city from using its credit to assist the railroad company.

In *Mead v. Acton*, 1 N. E .413, not only did the Court find that it was no part of the duty or function of the town to procure the passage of the statute, but the statute itself was held unconstitutional because it attempted to raise money by taxation for private purposes.

In *Henderson v. Covington*, 14 Bush, (Ky.) 312, the Court held that the construction of the

bridge across the Ohio River was not a part of the duty of the City Council, and furthermore, that the Council was not seeking to obtain legislation necessary to enable it to perform its corporate duties or to accomplish the purposes for which the corporation was created. In the instance case, the defendant municipality sought to obtain legislation to enable it to perform its corporate duties, imposed upon it by the Legislature, of locating, constructing and maintaining its streets.

In *Colusa County v. Welch*, 55 Pac. 243, it was held that the contract involved personal solicitations and private interviews with members of the Legislature and thus was against public policy, and also that the Board of Supervisors had no power or duty to act in the matter. The Court therein quoted the general rule as stated by Judge Cooley, i.e.:

> "The law also seeks to cast its protection around legislative sessions, and to shield them against corrupt and improper influences, by making void all contracts which have for their object to influence legislation in any other manner than by such open and public presentation of facts, arguments, and appeals to reason as are recognized as proper and legitimate with all public bodies. While counsel may be properly employed to present the reasons in favor of any public measure to the body authorized to pass upon it, or to any of its committees empowered to collect facts and hear arguments, and parties interested may lawfully contract to pay for this service, yet to secretly approach the members of such a

> body with a view to influence their action at a time and in a manner that do not allow the presentation of opposite views is improper and unfair to the opposing interest; and a contract to pay for this irregular and improper service would not be enforced by the law."
>
> *Cooley, Const. Lim.* (6th Ed.) p. 163.

We confidently assert that the facts of these cases are readily distinguishable from the facts in the case at bar, and not only were the contemplated services within the scope of the duty of the defendant municipality to locate, construct, and maintain its streets, but that they were admittedly strictly legitimate services and not lobbying services.

Herrick v. Brazee, 190 Pac. 141.

Stanton v. Embrey, 93 U. S. 549, 23 L. ed. 983.

Nutt v. Knut, 200 U. S. 1, 50 L. ed. 348 at 353.

In *Herrick v. Brazee, supra*, the Oregon Supreme Court emphatically approved appellees' contention, viz.:

> "In *Stanton v. Embrey*, 93 U. S. 549, where an attorney's fee for the prosecution of a claim against the United States before the officials of the Treasury Department, the services were rendered upon a contract for a contingent remuneration. The instruction of the trial Court to the jury which was approved upon appeal to the Supreme Court of the United States was in part as follows:
>
> > 'Where an attorney in the exercise of his ordinary labor and calling, and with the

> instrumentalities of his professional learning and industry, undertakes to work out a desired result for his client, not through personal influence, but through the instrumentalities of the law—by persuasion, as distinguished from influence—such an undertaking is not an unlawful one, or contrary to public policy.'

"A judgment for over $9,000 was affirmed.

"In 2 R. C. L. p. 1041, 112, we read:

> 'In contracts between attorneys and clients the usual test would seem to apply that if a contract can by its terms be performed lawfully, it will be treated as legal, even if performed in an illegal manner; while, on the other hand, a contract entered into with intent to violate the law is illegal, even if the parties may, in performing it, depart from the contract and keep within the law.'
>
> * * * * *
>
> 'The courts do not condemn the attempts to secure legislation for legitimate purposes and in a legitimate manner. Citing *Cole v. Brown-Hurley Hardware Co.*, 139 Iowa, 487, (117 N.W. 746, 18 L.R.A. (N.S.) 1161), 16 Ann. Cas. 846 and note, 18 L.R.A. (N.S.) 1661 and note; *Long v. Battle Creek*, 29 Mich. 323, 33, Am. Rep. 384; *Stroemer v. Van Orsdel*, 74 Neb. 113 (103 N.W. 1053, 107 N.W. 125), 121 A.S.R. 713 and note, 4 L.R.A. (N.S.) 212 and note; *Houlton v. Nichol* 95 Wis. 393 (67 N.W. 715), 57 A.S.R. 928, 33 L.R.A. (166). . . . . But as the law does not presume that a person intends to violate its provisions the general principle controlling the construction of a contract to influence legislation when the contract

> itself does not in terms stipulate for improper means seems to be that it will be upheld, unless the use of such means appears by necessary implication. The test is, does the contract, by its terms or by necessary implication, require the performance of acts which are of a corrupt character or which have a corrupting tendency?' 6 R.C.L. pp. 732, 733."

THE EXPENDITURE BY THE CITY COUNCIL DID NOT INVOLVE THE ASSESSMENT OF A TAX FOR AN ILLEGAL PURPOSE, AND WILL NOT CAUSE PLAINTIFF TO SUFFER AN INJURY DIFFERING IN KIND FROM THAT SUFFERED BY THE GENERAL PUBLIC, AND THE PLAINTIFF CANNOT MAINTAIN THIS SUIT.

As we have urged, it is our understanding that the facts before the Court are to be taken only from the further answer and new matter contained in defendants' answer and that no extrinsic facts can be garnered from the plaintiff's amended complaint or from other portions of the defendants' answer. If we are mistaken in this, then we respectfully urge that in any event the admitted facts remain as heretofore herein set forth and, furthermore, that those facts clearly show that the plaintiff can not maintain this action. He alleges that he is a taxpayer and that he has paid large sums of taxes on his property and that a large sum of the monies in the municipality's treasury represents and is the very monies so paid by him into

the treasury. (P. R. p. 2.) The defendants deny that any part of these monies is the very money so paid by plaintiff, but admit the plaintiff is a taxpayer (P. R. pp. 20, 21.) These monies are admittedly derived from the several sources enumerated in defendants' further answer and have not been appropriated or set aside for any specific purpose whatsoever, and the appropriation and expenditure of them in the payment of defendant Robertson's expenses would not necessitate the levying of a special tax or increase the taxes levied for the current year. (P. R. p. 28.) It thus clearly appears that the plaintiff will not suffer any private injury, or any injury differing in kind from that which will be suffered by the public generally; furthermore, that neither the plaintiff nor the public will suffer any injury whatsoever because the appropriated expenditure will neither necessitate a special tax nor increase the tax lavy; also, that the monies are not derived solely from real and personal taxation but are derived from various sources including revenues and profits made by the city's operation of its city dock and facilities. While under certain circumstances a taxpayer or private citizen can maintain a suit to enjoin the threatened expenditure of public monies by a municipality in an unlawful or prohibited manner, yet we submit thet a private citizen can not maintain such suit unless he shows that he will suffer an injury differing in kind and not merely in degree from that suffered by the public generally.

19 R.C.L., p. 1164, 1165.

Circuit Justice Bradley, in a case coming before him, upon this point said:

> "The bill assumes that a taxpayer, who is liable to be assessed for the public taxes that will be necessary to pay the State debt and interest thereon, can maintain a private suit to prevent the State officers from executing and issuing bonds which the Legislature has unconstitutionally authorized and required to be issued. I do not think that such a suit can be maintained. It is a general rule that a man cannot maintain a private suit for an injury which he sustains in common with every other citizen. To allow such actions would promote endless litigation."

Morgan v. Graham, 17 Fed. Cs. No. 9,801.

The Oregon cases clearly enunciate this doctrine:

> "His (taxpayer's) right to invoke the aid of a court of equity to restrain by injunction such unlawful acts depends upon his personal injury, and the test of such injury is measured by the fact that his property would be subjected to an additional burden of taxation. If his property will not be subjected to an additional burden of taxation, and he will not sustain any other personal damages, his injury is not contradistinguished from that of all other taxpayers of the municipality, and he can not invoke the aid of equity to prevent an unlawful corporate act, however much he may, in common with others, be injured."

Sherman v. Bellows, 24 Ore. 554, 34 P. 549.

See also:

McKinney v. Watson, et al. 145 Pac. (Ore.) 266, 267.

Andrews v. South Haven, 153 N.W. (Mich) 827, L.R.A. 1916-A, 908.

And at the expense of repetition, we again reiterate that the record also conclusively shows that the public generally has suffered no injury by the defendants' acts.

CONCLUSION.

The admitted facts and the law thus clearly establishing that the defendant municipality was authorized to make the appropriation and expenditure in the manner alleged by defendants' further answer and new matter for the purpose of sending to Washington, D. C., the defendant Robertson to explain to the committees of Congress the necessity of the municipality's being permitted to issue bonds for the purpose of raising the funds necessary to enable that municipality to build necessary permanent streets and that the defendant Behrends as treasurer was authorized to pay the money so appropriated to said defendant Robertson and that the latter was authorized to use the same, or so much thereof as was required therefor, to pay his expenses to and from Washington, D. C., we earnestly urge that the learned trial Court correctly and logically reached the conclusion embodied in his opinion (P. R. pp. 41-56), and that, the appellant having refused to plead over and having

stood upon his demurrer, judgment was properly entered herein for the appellees, and that said judgment ought of right to be sustained, not only for the reasons given by the trial Court but also because the record clearly discloses that the appellant has entirely failed to show that he will suffer any injury differing in kind from that which the general public will suffer or that the general public itself will suffer any injury whatsoever by defendants' acts and appellant cannot maintain this action.

Respectfully submitted,

HELLENTHAL & HELLENTHAL,
R. E. ROBERTSON,

Attorneys for Appellees.

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES E. BOULDIN, DAVID W. BOULDIN, HELEN L. BOULDIN (now BRANSFORD), and WELDON M. BAILEY,
Plaintiffs in Error.

vs.

ALTO MINES COMPANY, a corporation,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

BEN C. HILL,
Attorney for Defendant in Error.

Filed this.....day of May, 1924.

.....
Clerk of the United States Circuit Court of Appeals, Ninth Circuit.

ACME-TUCSON

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TABLE OF CASES CITED

IN THE

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James E. Bouldin, David W. Bouldin, Helen L. Bouldin (now Bransford), and Weldon M. Bailey,
Plaintiffs in Error,
vs.
Alto Mines Company, a corporation,
Defendnt in Error.

BRIEF OF DEFENDANT IN ERROR

SUPPLEMENTAL STATEMENT OF CASE

This was an action in ejectment tried before the District Court on November 4th and 5th, 1919. The defendant, Alto Mines Company, answered. Its right to possession was based upon a tax deed to the property involved. The main question in the case was whether or not the lands embraced within Baca Float No. 3 were taxable by the State of Arizona prior to December 14, 1914. At the time of the trial, the same question was before the Supreme Court of the State of

Arizona, on appeal, in a case in which the plaintiffs in error herein were parties. On December 16, 1919, the Supreme Court of Arizona held that the lands within the Float were taxable prior to 1914. Thereafter, and on November 21, 1921, the Supreme Court of the United States denied a Writ of Error to the Supreme Court of Arizona for want of jurisdiction. The judgment for the defendant, Alto Mines Company, was entered in February, 1923; Judge Sawtelle stating in his memorandum opinion that he felt bound by the decision of the Arizona Supreme Court, "the same being a construction of an Arizona Statute by the Arizona Supreme Court," (Tr. p. 221).

ARGUMENT

I

Taxability

NOT ONLY IS THE TAXABILITY OF THE ALTO PROPERTY RES ADJUDICATA, BUT THERE WAS A CLEAR RIGHT TO TAX FOR THE YEARS SHOWN IN THE JUDGMENT, AND THE SUPREME COURT OF ARIZONA HAS RECENTLY SO HELD. THE SALE UNDER EXECUTION OF THE TAX JUDGMENT OF THE INTERESTS OF THE PLAINTIFFS HEREIN WAS JUST AS GOOD AS THEIR OWN DEED WOULD HAVE BEEN, AS THEY HAD AN UNDIVESTIBLE LEGAL TITLE TO A TRACT OF LAND, THEN DEFINITELY DEFINED AND SEGREGATED.

In *Lane vs. Watts* (234 U. S. 525; 235 U. S. 17) the Supreme Court held that legal title to the Float had been divested from the United States on April 9, 1864, that segregation by survey was accomplished by the Contzen survey (234 U. S. 525, 540, 541; 235 U. S. 17, 20); and the filing (in reality, recognition) of the plat thereof, *as a muniment* (evidence) *of title,* was decreed, as the right to such muniment was expressly given by the Act of 1860 (12 Stat. 71, §6) making the grant, and the Commissioner's order of April 9, 1864, approving the location.

> "In so deciding the Court evidently proceeded upon the view that the specific description contained in the application of June 17, 1863, identified the land applied for and that the approval of that selection by the Commissioner of the General Land Office attached the title granted by Congress to that specific tract, and that no patent was required." (*Wise vs. Watts,* 239 Fed. 207, 213.)

Prior to the filing in 1908 of the Bill in *Lane vs. Watts* (as the pleadings therein show and the record at bar discloses), the Contzen survey had been made in 1905, approved by the Surveyor-General of Arizona in 1906, and "examined and found correct" by the Commissioner of the General Land Office (*Lane vs. Watts,* 234 U. S. 525, 534), (Tr. p. 199), or as the Circuit Court of Appeals said in the title case (*Wise vs. Watts,* 239 Fed. 207, 211), "Duly approved and thereafter filed

in the General Land Office." At all times thereafter, the plat of survey was actually on file in the Land Department in Washington.

The contention that the plat of survey was not "approved and filed" until December, 1914, is absolutely erroneous. (Pltf. Brief p. 7.) The decree in *Lane vs. Watts* simply directed the filing or recognition of the plat of survey as a *muniment of title.*

Baca Float No. 3 ceased to be a part of the public domain on April 9, 1864, (*Alta Co. vs. Benson,* 2 Ariz. 362, 370, 16 Pac. 565, 568; affirmed in 145 U. S. 428); otherwise *Lane vs. Watts* could not have been maintained.

The legal segregation of the grant from the public domain took place on April 9, 1864, and the Bill in *Lane vs. Watts* so averred (234 U. S. 525, 535). The physical segregation or monumenting of boundaries was completed and approved either in 1905 or 1906, or at any rate prior to the filing of the Bill in *Lane vs. Watts.*

At any rate, the filing of the plat of survey *as a muniment* in 1914 gave no new title; it simply supplied the *evidentiary incident,* given by the statute and order making the grant, of a title which passed over fifty years prior thereto, a title which for over fifty years had been sold, conveyed, mortgaged, partitioned, and even sold under execution as to one of the Bouldins.

If the plaintiffs' voluntary deed of June 29, 1914, would have been good, the Sheriff's deed is certainly good, whatever can be conveyed voluntarily can be conveyed *in invitum* by judicial process.

When the statutes of limitation on adverse possession commenced to run is another story, as the technical muniment may or may not have been essential thereto, under the strict technicalities surrounding a recovery in ejectment.

The plaintiffs herein, and their predecessors in title, had a legal title to a definite tract with exact metes and bounds, which could be and was conveyed, at all times since April 9, 1864. Their right to the particular land *in metes and bounds* was complete and nothing that they did do (in their numerous attempts at re-location), and nothing they did not do, could in any way impair or improve the title which passed on April 9, 1864 (*Wise vs. Watts*, 239 Fed. 207). They were not excluded by law from taking possession. A legal title imports a right of possession.

So far as it may be of interest as an academic proposition we may state that the entire Float was taxable, prior to 1910, and the Supreme Court of Arizona has recently so held. The opinion of the Court in that case (*State of Arizona vs. Watts,* 21 Ariz. 93, 185 Pac. 934) contains some inaccuracies in its statements of facts but the opinion clearly holds that the interest of the plaintiff herein was so taxable, at least upon the "claim to" the Float.

Bearing in mind the exact facts, the passing of legal title in 1864, the function and effect of the survey as a mere physical monumenting of the metes and bounds, and the decreed filing or recognition of the plat of survey as *evidence* of title or boundaries, a reference to the following cases will demonstrate the soundness of our views on taxability, even though the title to the Float was in dispute with the Land Department, and the filing of the plat of survey as a muniment of title had not been effected, as the land was no longer "property of the United States:"

N. P. R. R. Co. vs. Patterson, 154 U. S. 130, 131, 132, 134. (Land taxable even when Land Department denied title had passed to owner and when owner claimed land had "never been segregated from the public lands or identified, and the boundaries of the specific lands granted had never been ascertained or determined."—page 131.)

Witherspoon vs. Duncan, 4 Wall. 210.

Leibes vs. Steffy, 4 Ariz. 10; 77 Pac. 617 (land taxable when full equitable title has passed even to unsurveyed land.)

Burcham vs. Terry, 18 S. W. 458; 55 Ark. 398.

Frost vs. Spitley, 121 U. S. 552, 556.

Carroll vs. Safford, 3 How. 441.

Wisconsin Co. vs. Price County, 133 U. S. 476.

Alta Co. vs. Benson, 2 Ariz. 362, 370; 16 Pac. 565, 568; affirmed, 145 U. S. 428.

Christianson vs. Kings County, 239 U. S. 356, 364.
Robinson vs. Gaar, 6 Calif. 274. (Validity of grant contested, and owner not in possession.)

The case of *Northern Pacific Railway Company vs. Thompson,* 253 Fed. 178, is not in point for the plaintiffs:

1. That case was a direct attack on the tax, while in the case at bar the attack is collateral after a judgment of taxability by an Arizona court of competent jurisdiction.

2. Survey is ordinarily essental to pass title to a railroad land grant, as such grants are generally of alternate sections and there can be no section until after a survey makes and defines sections. In the case at bar, the grant was of a specific tract whose boundaries were fixed in 1863 and 1864, and simply monumented in 1905. The case in question is specifically limited in the opinion to a railroad land grant.

3. The Baca Float tax case in the Arizona Supreme Court, as to which a Writ of Error was dismissed by the United States Supreme Court, determines the taxability of the Float for the year or years in question. There is therefore no reason to resort to analogy: there is direct authority as well as a direct adjudication.

4. The case in question holds that the Commissioner's approval of the plat of survey is sufficient to make even a railroad grant taxable, and that filing of the plat locally thereafter is not essential to taxability.

The Commissioner's approval at bar took place before 1908. So the case is an authority against the plaintiffs.

The statement that "No patents appear to be in existence" (Pltffs. Bf. p. 2), finds no support in the record. The complaint and judgment declared them "patented mines"—private property, and such of them as are involved herein are in fact private property and have been since April 9, 1864.

On page 26 of plaintiff's brief, the question is asked, what possible notice could B have that his own property was being assessed. This could be followed by another question.

Why were plaintiffs herein made parties to the action and why did their attorney attend the sale? The plat of the Contzen survey, as familiar to them and their attorneys as the alphabet, showed the Alto property within the Float; and there is no evidence herein that they did not know such was the case. Locating a mining claim on private property is a nullity; but a foreclosure of the land, in which the real owner and the locator are made defendants, bars their rights. And the tax judgment so declared.

THE DEFENDANT HEREIN HAD A CLEAR RIGHT TO PURCHASE AT THE TAX SALE FOR ITS OWN ACCOUNT.

That was absolutely permissible, particularly as the title was in bitter dispute, and the defendant herein had only a quitclaim title *dated after the commencement of the tax action,* and made by a grantor (Santa Cruz Development Co.) which has since been adjudicated to have had no title to convey *and which was never in possession.*

Allen vs. Evans, 7 Ariz. 359; 64 Pac. 412.
Atkinson vs. Dixon, 1 S. W. 13; 86 Mo. 464.
Pickering vs. Lomax, 120 Ill. 260; 11 N. E. 175.
Jeffrey vs. Hursh, 7 N. W. 221; 45 Mich. 59.

There is no evidence herein as to the possession of the property. The allegations in our amended answer pleading adverse possession were abandoned at the trial and related only to our inurement to whatever title the *defendant mining corporations in the tax suit* acquired by adverse possession. By purchasing at the tax sale we took all the rights of *all* the defendants.

II

Collateral Attack

This was an action at law in ejectment and the primary question involved on the trial was the effect of a sale for taxes of the Alto group of mines, located within Baca Float No. 3, under a tax judgment recovered by the State of Arizona against the plaintiffs and their predecessors in title, in an action for delinquent

taxes under the Arizona Delinquent Tax Act of 1903 (Laws of 1903 pp. 162 to 173) which, throughout the action, sale and conveyance, was the law of the case. (Arizona Civil Code of 1913, Sec. 4940.)

The Court will note that the sale was not summary but judicial. If summary, the defendant herein would be required to prove a valid tax and a regular sale. But the sale was judicial (Tr. p. 117), in pursuance to the judgment of a court of general jurisdiction, in an action with all known claimants of record as parties; and such a judgment and sale, under all the authorities, both State and Federal, is entitled to the same immunity from collateral attack as all other judgments and sales had in a court of general jurisdiction.

The Arizona Act of 1903 is taken practically word for word from Missouri (*Arizona Copper Company Ltd. vs. State,* 15 Ariz. 9, 20, 137 Pac. 417; *Territory vs. Copper Queen Consolidated Mining Co.,* 13 Ariz. 198, 215, 108 Pac. 960, affirmed in 233 U. S. 87) and the Arizona courts are bound by the construction placed upon that statute by the highest appellate courts of Missouri prior to 1903 (*Territory vs. Copper Queen Consolidated Mining Co.,* 13 Ariz. 198, 215, 108 Pac. 960; affirmed, 233 U. S. 87), and such is the rule in the Federal courts. (*Arizona vs. Copper Queen Consolidated Mining Co.,* 233 U. S. 87; *Henrietta M. & M. Co. vs. Gardner,* 173 U. S. 123, 130; U. S. R. S. §721, U. S. Comp. Stat. 1916 and 1918 Eds. §1538). The

Act of 1903 gave a right of action, *quasi in rem,* in favor of the State, in a court of general jurisdiction. (*Territory vs. Copper Queen Consolidated Mining Co.,* 13 Ariz. 198, 215, 108 Pac. 960; affirmed, 233 U. S. 87.) The validity of the tax is now *res adjuticata*, and the effect of the judgment and sale, when attacked collaterally, is in no wise dependent upon proof of the validity of the tax or the freedom of the proceedings from errors or irregularities.

Of course, in the tax action, the State cannot recover without showing a valid tax, but a judgment for the tax is just as binding as any other judgment and fully adjudicates the subject matter.

THE SUPERIOR COURT OF SANTA CRUZ COUNTY, ARIZONA, HAD FULL JURISDICTION IN THE ALTO TAX SUIT.

As applied to judicial tribunals, jurisdiction is the power to hear and determine the cause (7 Ency. U. S. Sup. Ct. Rep. 739).

Jurisdiction over the subject matter means jurisdiction over the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organized the Court and is to be sought for in the general nature of its powers or in the authority specially conferred (*Cooper vs. Reynolds,* 10 Wall. 308, 316). Such jurisdiction was conferred by the Arizona Laws of 1903, pages 162 to 173.

Jurisdiction over the subject matter does not mean simply jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which that particular case belongs (7 R. C. L. 1029, 1030). "It is the power to deal with the general abstract question * * * and to determine whether or not they (the facts) are sufficient to invoke the exercise of that power" and "to enter upon the inquiry." (*Tube City Co. vs. Otterson,* 16 Ariz. 305, 311; 146 Pac. 203; a case well worth reading on the subject of jurisdiction.

Obviously the sovereign state of Arizona may confer on one of its courts of general jurisdiction the power to determine as against all the world, except the United States itself, whether or not taxes are owing or lawfully levied on any land within the borders of that state (*Witherspoon vs. Duncan,* 4 Wall. 210).

The power to adjudicate taxability necessarily carries with it the power to enforce that adjudication in the manner provided by the law conferring upon the court the power to make the adjudication.

The primary repository of the general judicial power of the state of Arizona is its Superior Court. It is a court of general jurisdiction, both civil and criminal, at law and in equity (*Tube City Mining Co. vs. Otterson,* 16 Ariz. 305, 311; 146 Pac. 203). Its predecessor

court of territorial days was of equal power and dignity.

When in 1903, Arizona, by a new statute gave a new jurisdiction to one of its courts of general jurisdiction, to be exercised judicially and according to the general principles of the common law or chancery, the proceedings of that court under that statute were the proceedings of a court of general jurisdiction, to whose proceedings all presumptions of regularity are due. (*Harvey vs. Tyler,* 2 Wall. 342).

What plaintiffs herein assert to be a lack of jurisdiction was at most an erroneous decision on a matter of law in a case wherein they did not deign to present their defense (Tr. p. 87). Obviously an erroneous decision on a matter of law in rendering a judgment, or even a disregard of statutory provisions, does not deprive a court of jurisdiction of the cause (*Santiago vs. Nogueras,* 214 U. S. 260).

Anything that would defeat the cause of action is a matter of defense which must be pleaded and proved, and the failure of the plaintiffs herein to do so did not divest the jurisdiction of the court or impair its judgment.

If the Superior Court of Arizona did not have jurisdiction to determine the taxability of the land in the Alto tax suit, what court did have such jurisdiction?

A very practical confirmation of the *jurisdiction* of the Superior Court in the Alto tax suit is the fact that

the plaintiffs herein litigated therein, and in the Supreme Court of Arizona, the taxability of the Float for the years 1913 to 1916. (*State vs. Watts, supra*) (see 21 Ariz. 93, for names of parties to that suit). They are bound by the judgment in that case, being parties, and yet seek to have this court overrule that decision as if on appeal. The right of further appeal from that decision was denied by the Supreme Court of the United States in dismissing the Writ of Error to the Supreme Court of Arizona on November 21, 1921, for *want of jurisdiction.* 66 L. Ed. p. 399.

Jurisdiction of the subject matter means of the "class of cases;" the Superior Court certainly had *jurisdiction* to determine its taxability. The Supreme Court of Arizona has held the Float taxable before 1914, and even the plaintiffs herein did not question the jurisdiction in that case. Furthermore, the Float has been private land since April 9, 1864. Of the cases cited, *Jourdan vs. Barrett* (4 How. 169) and *Gibson vs. Choteau* (13 Wall. 92) relate to statute prior to passage of legal title; *Wilcox vs. McConnell* (13 Pet. 496) has nothing to do with the effect of a judgment; *Hackall vs. C. & O. Canal Co.* (94 U. S. 308) was a summary tax sale and so were the two Wisconsin cases. A summary tax sale is open to defenses; an Arizona tax sale after judgment is not. *Ritchie vs. Sayers* (100 Fed. 520) was a sale of attached property on constructive service without filing the statutory forthcoming bond. And there is a differ-

ence between the statutory power of the court to render a judgment, and the propriety of the judgment in a given case, especially when the propriety is based on a matter of defense that is not pleaded.

THE JUDGMENT OF A STATE COURT, EVEN THOUGH RENDERED ON DEFAULT, CANNOT BE ATTACKED COLLATERALLY EXCEPT FOR AN ABSOLUTE AND APPARENT LACK OF JURISDICTION.

Judgments of a State court when offered elsewhere "are not re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and the parties" (*Hanley vs. Donohue,* 110 U. S. 1, 4; *Simmons vs. Saul,* 138 U. S. 439, 459). To the proceedings of such a court all presumptions of regularity are due (*Harvey vs Tyler,* 2 Wall. 342).

Where jurisdiction depends on the facts, such a judgment is conclusive against collateral attack (*Grignon vs. Astor,* 2 How. 319; *Tube City Co. vs. Otterson,* 16 Ariz. 305, 146 Pac. 203).

A judgment is conclusive as to everything it determines on matters in issue (*S. F. R. Co vs. U. S.*, 168 U. S. 1; Last Chance Mining Co. vs. Tyler M. Co., 157 U. S. 683; *Reynolds vs. Stockton,* 140 U. S. 254; *Peck vs. Jenness,* 7 How. 612).

"A judgment is conclusive as to all the *media concludendi* aU. S. *vs. California & O. Land Co.,* 182 U. S. 365), and it needs no authority to show that it cannot be impeached either in or out of the State by showing that it was based on a mistake of law" (*American Express Co. vs. Mullins,* 212 U. S. 311).

A judgment cannot be impeached collaterally on account of any irregularity or insufficiency of the cause of action or taint of illegality (23 Cyc. 1071, 1072).

An attack on a judgment for want of jurisdiction of subject matter is collateral when founded on extraneous evidence (15 R. C. L. 311). To hold a judgment void collaterally, it is necessary to show, beyond any controversy, that upon the record the court could not have had jurisdiction (*Evers vs. Watson,* 156 U. S. 527, 532, 533).

As was said in the famous case of *Grignon vs. Astor* (2 How. 319):

> "A judgment of a court of general jurisdiction is absolute verity, to contradict which there can be no averment or evidence"; such a court can decide on its own jurisdiction. "A judgment in its nature concludes the subject on which it is rendered and pronounces the law of the case. The judgment of a court of record, whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive in this court as it is in other courts. It puts an end to all in-

quiry into the fact by deciding it." A purchaser under its judgment is protected, no matter how erroneous it may have been or how palpably the court disregarded or misconstrued the law. The principle is of more universal application in proceedings *in rem* after a final decree by a court of competent jurisdiction.

A judgment of a court within its jurisdiction is not void though wrong, and cannot be attacked collaterally, as the remedy is by appeal (*Tube City Co. vs. Otterson,* 16 Ariz. 306, 146 Pac. 203).

A judgment cannot be attacked collaterally even when the court errs in holding that a case has been made, either under its inherent power as a court of equity or its statutory authority (*U. S. vs. Moran,* 218 U. S. 493).

"A judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest" (*Last Chance Mining Co. vs. Tyler Mining Company,* 157 U. S. 683, 691; *Southern P. R. Co. vs. U. S.,* 168 U. S. 1, 5). And it is so held in Arizona (*Tube City Co. vs. Otterson,* 16 Ariz. 305, 146 Pac. 203); and generally elsewhere (15 R. C. L., 669).

A judgment cannot be attacked collaterally even for failure to appoint a *guardian ad litem* for an infant defendant (*Colt vs. Colt,* 111 U. S. 566), or for failure to call a jury as required by law (*Briscoe vs. Rudolph,*

221 U. S. 547), or if rendered before time for answer expires (*White vs. Crow,* 110 U. S. 183).

Estoppel by judgment applies even against the United States when it seeks to attain the same result in another suit on a different ground or in another capacity (*U. S. vs. California & O. Land Co.,* 192 U. S. 365).

Estoppel by judgment applies to a municipality even though it subsequently discovers that land which was the subject of a prior adjudication of sale against it had been dedicated to the public use and was not salable (*Werelin vs. New Orleans,* 177 U. S. 390).

Considering the great number and variety of courts in this country, as well as the division of judicial jurisdiction among state and national courts, comity of necessity must be observed to the highest degree, in the interest of a sound public policy and to preserve in our people a reverend respect for all courts and their judgments.

In *Simmons vs. Saul,* 138 U. S. 439, 454, it was said:

> "The entry of a decree is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken; if none is given from the final decree, it is conclusive on all whom it concerns. A purchaser under it is not bound to look beyond the decree; if there is error in it, of the most palpable kind; if the court which rendered it has, in the exercise of jurisdiction, disregarded or

misconstrued or disobeyed the plain provisions of the law which gave it the power to hear and determine the case before it, the title of the purchaser is as much protected as if the adjudication would stand the test of a writ of error."

THE FEDERAL COURTS RECOGNIZE NO DIFFERENCE, AS REGARDS IMMUNITY FROM COLLATERAL ATTACK, BETWEEN A JUDGMENT IN A TAX SUIT AND A JUDGMENT ON ANY OTHER CAUSE OF ACTION.

"A judgment for taxes does not differ from any other in respect to its conclusiveness" (*New Orleans vs. Warner,* 175 U. S. 120, 141).

Res adjudicata applies in tax cases (*Landex vs. Mercantile Bank,* 186 U. S. 458, 476).

A tax judgment is conclusive as to the validity and legality of the tax, and cannot be attacked or questioned collaterally (*U. S. Trust Co. vs. Mercantile Trust Co.*, 88 Fed. 140, 157, 158; U. S. C. C. A., 9th Circuit).

A tax judgment, even though obtained on service by publication, and a sale thereunder, cannot be attacked collaterally even for serious irregularities in the assessment and the proceedings and an apparent lack of any notice of sale; so held where the sale was of lots and blocks by number alone, when there were no such num-

bers in fact on the recorded map, and the official tax plat had marked the lots "reserved," the sale being held good as to the "reserved" lots, as they were held to be what was intended to be sold; and a statute, similar to §89 of the Arizona Tax Law of 1903 or §4939 of the Arizona Civil Code of 1913, creating presumptions of regularity, etc., in favor of a tax deed under a tax judgment, is valid.

Wilfong vs. Ontario Land Co., 171 Fed. 51; U. S. C. C. A., 9th Circuit.

Ontario Land Co. vs. Wilfong, 223 U. S. 543, 553, 559.

Ontario Land Co. vs. Yordy, 212 U. S. 152.

Warren vs. Oregon & W. R. R. Co., 176 Fed. 336, 337 (U. S. C. C. A., 9th Circuit).

A tax decree is immune from collateral attack, even though a jury required by statute was not called (*Briscoe vs. Rudolph,* 221 U. S. 547).

A judgment in a tax action is conclusive against collateral attack even for an illegal tax, as the owner had the right to have his day in court to contest its validity in the action in which the tax judgment was rendered (*Chicago Theological Seminary vs. Gage,* 12 Fed. 398, 401).

IT IS THE SETTLED LAW OF ARIZONA AND MISSOURI, THAT A TAX JUDGMENT HAS THE SAME IMMUNITY AS ANY OTHER JUDGMENT FROM COLLATERAL ATTACK AND THAT ERRORS OR IRREGULARITIES, NO MATTER HOW NUMEROUS OR GROSS, DO NOT AFFECT IT, AND THAT IT ADJUDICATES TAXABILITY AND A VALID TAX.

As heretofore stated, the construction placed upon the Missouri statute, prior to 1903, by the courts of last resort in that state, was adopted and forms a part of the Arizona statute.

The courts of Missouri have held almost innumerable times that such a judgment, even on constructive service, is good collaterally, no matter how numerous or gross the errors or irregularities therein may have been, or that it was for an erroneous assessment, or if the land was not actually assessed at all, or that the taxes were paid before the suit; and that the validity of the tax is conclusively established by the judgment, that the court in rendering it was acting within its general jurisdiction, that the existence of a valid assessment and of taxability is adjudicated by the judgment; that the recitals of the judgment are immune from collateral attack, that the lack of jurisdiction based on the extrinsic facts cannot be shown *aliunde;* in fact, those courts have to the fullest extent and in the most sweeping manner brushed aside all attempts to re-open collaterally the judgment in any way, and have repeatedly

pointed out the distinction between a summary sale for taxes by an administrative officer and a sale under a tax judgment of a court of general jurisdiction. We need only cite some of the cases, and a reading thereof will demonstrate not only the accuracy of our statement, but the judicial trend.

Allen vs. Ray, 10 S. W. 153; 96 Mo. 542 (1888).

Allen vs. McCabe, 93 Mo. 136 (1887).

Gibbs vs. Southern, 22 S. W. 713; 116 Mo. 204 (1893).

Boyd vs. Ellis, 18 S. W. 29; 107 Mo. 394 (1891).

Hill vs. Sherwood, 8 S. W. 781; 96 Mo. 125 (1888).

State vs. Hunter, 11 S. W. 756; 72 Mo. 386 (1889).

Schmidt vs. Niemeyer, 13 S. W. 405; 100 Mo. 207 (1890).

Charley vs. Kelley, 25 S. W. 571; 120 Mo. 134 (1894).

Jones vs. Driskell, 7 S. W. 111; 94 Mo. 190 (1888).

Skillman vs. Manwaring, 73 S. W. 447; 173 Mo. 21 (1903).

South Missouri Co. vs. Carroll, 164 S. W. 599; 255 Mo. 357 (1914).

Skillman vs. Clardy, 165 S. W. 1050; 256 Mo. 297 (1914).

That such is the rule of the Federal Courts has been demonstrated, *supra.*

Even if the tax on the Alto mines was clearly illegal, or unconstitutional, and they were not taxable at all,

the judgment cannot be attacked collaterally, as the plaintiffs herein refused their day in court. See cases previously cited; also:

Mayo vs. Ah Loy, 32 Calif. 477; 91 Am. Dec. 595.
Mayo vs. Foley, 40 Calif. 281.
Chicago Seminary vs. Gage, 12 Fed. 398; 401.
Burcham vs. Terry, 13 S. W. 458; 55 Ark. 398.

The tax judgment is even conclusive between the parties and their respective successors in interest that the land was private, assessable and salable land, and not public property (*Warlain vs. New Orleans,* 177 U. S. 390; *Hewes vs. Miller,* 98 Atl. 776, 254 Pa. 957).

THE PLAINTIFFS HAVE NO STANDING TO QUESTION IN ANY WAY THE VALIDITY OF THE ALTO TAXES OR THE TAX JUDGMENT AND SALE, AS THEY HAVE NOT COMPLIED WITH THE PROVISIONS OF A CONDITION PRECEDENT IMPOSED BY THE LAW OF ARIZONA, BINDING ON THIS COURT AS A RULE OF DECISION.

Section 4939 of the Arizona Civil Code of 1913, so far as material, reads as follows:

> "No person * * * upon which a tax shall have been imposed under any provision of law relating to taxation of real or personal property shall be permitted for any reason to test the validity thereof, either as plaintiff or defendant, unless the amount of such taxes shall first have been paid to

> the county treasurer whose duty it is to collect the same * * * but after payment action may be maintained to recover any tax illegally collected * * *.

Such statute is binding upon a Federal Court. (*Wilfong vs. Ontario Land Co.,* 171 Fed. 51, 53, 54, and cases cited, U. S. C. C. A., 9th Circuit; U. S. R. S. §721, U. S. Comp. Stat. 1916 and 1918 Eds. §1538. Defendant in its amended answer pleads plaintiff's noncompliance with that statute.

Certainly there can be no question of the application of that statute, and the legislative policy which it expresses, when the contest is made as plaintiff and collaterally. The taxes on the Alto property are, therefore incontestable herein, irrespective of *res adjudicata.*

III

Sheriff's Deed Conveyed Fee Simple Title

THE TAX JUDGMENT ADJUDICATED THAT A FEE SIMPLE TITLE WOULD PASS ON THE SALE THEREUNDER, AND SUCH A TITLE ACTUALLY DID AND COULD PASS ON THE SALE.

Right to sell

The sale of the Alto property as patented mines was good. The judgment adjudicated that they are patented, and they are certainly not owned by the United

States and have not been since 1864. By their sale for taxes as patented mines, the ownership of the fee passed. (*Earhart vs. Powers,* 17 Ariz. 55, 57, 148 Pac. 286; *Forbes vs. Gracey,* 94 U. S. 762, 766).

On such a sale, every interest of the defendant in the mining property passes. (*Elder vs. Wood,* 208 U. S. 226; *Witherspoon vs. Duncan,* 4 Wall. 210; *N. P. R. R. Co. vs. Patterson,* 154 U. S. 130, 134).

Even if something remained to be done by the United States, or even if legal title were still in the United States, the tax sale passed the present or subsequent legal fee, as has been repeatedly held in tax cases (See tax cases cited in Point I, particularly *Burcham vs. Terry,* 18 S. W. 458, 55 Ark. 396; *Leibes vs. Steffy,* 4 Ariz. 10, 77 Pac. 617; *Elder vs. Wood,* 208 U. S. 226; *Witherspoon vs. Duncan,* 4 Wall 210). In the last mentioned case, on all fours with that at bar, a summary tax sale against the holder of a void entry, passed the fee even as against the subsequent rightful patentee, in a grant case very similar to Baca Float No. 3.

Assessment

The assessment was of "patented mines" as "real estate," which clearly was intended against the legal fee simple title thereto and the land covered thereby (*Earhart vs. Powers,* 17 Ariz. 55, 57, 148 Pac 286; *Forbes vs. Gracey,* 94 U. S. 762, 766).

Sale could only be of real estate

The Arizona Act of 1903 permitted a tax suit only for taxes on real estate; that proves real estate was intended to be sold and title of owners to real estate to be foreclosed.

Pleadings in tax suit

The petition or complaint in the tax case stated:

> "2. Plaintiff further alleges that the *defendants herein* are the *owners* of the following described *tracts of land* situated in the County of Santa Cruz and State of Arizona, to-wit: The following patented mining claims" * * * (Tr. p. 31).
>
> "That all the above described *tracts of land* were for each of the years and for the several purposes, and to the amounts hereinafter set forth, *subject to taxation* under the laws of the former Territory of Arizona." (Tr. p. 33.)
>
> "3. That the Assessor * * * did proceed to list and assess the full cash value for taxation of said *tracts of land* * * * and under and by virtue of the laws of the then said Territory * * * the duly elected, qualified and acting officers * * * did * * * levy *upon said real estate* * * * certain * * * taxes on the separate *tracts* of said *real estate* * * * patented mines known as 'The Alto Group,' * * * all of which will appear from a tax bill hereto annexed" (At that time an unpatented

mining claim was not taxable as real estate under Arizona law) (Tr. p. 33).

"4. That all of said taxes * * * against said above described *tracts of land* * * * remain due and unpaid."

5 Mentions *"the above described tracts of land"* and repeatedly speaks of the *"real estate aforesaid"* and *"the land"* and *"the above described tracts"* and insertion of the names of the *"owners"* of said *"tracts"* in the tax records. (Tr. p. 42.)

6. Speaks of an endeavor to collect taxes *"against said real estate."* (Tr. p. 45.)

7. Penalties are mentioned for non-payment of the taxes *"upon the said several tracts of land."* "That all of *said tracts of land"* were returned delinquent. (Tr. p. 46.)

8. Alleges that under the laws of Arizona *"all* taxes assessed and levied upon each of said respective *tracts of real estate* * * * became and are a *first and paramount lien* * * * on each of the said *tracts* respectively * * * said *lien* upon said *real estate* * * * is retained in favor of said State * * * to *enforce said lien* by suit. (Tr. p. 46.)

9. Alleges employment of attorney.

"Wherefore * * * *the State of Arizona* * * * prays judgment * * * against said defendants

and that (the taxes) be declared *a first and paramount lien* in favor of the State of Arizona and *all equities of redemption foreclosed* * * * that said *lien* be *enforced* and said *real estate* * * * be *sold.*" (Tr. p. 48.)

Annexed thereto are copies of the back tax bills against *"Patented mines known as Alto Group,"* with separate assessments, under *"real estate."* (Tr. p. 37-40.)

By not answering, each of the defendants therein (including the plaintiffs herein) admitted each and every allegation of fact in the petition.

Judgment

The judgment adjudicates taxes due "upon the following *patented mines,* * * * United States patents for all of said last mentioned mining claims being of record in the County Recorder's Office of Santa Cruz County." (Tr. p. 88.) And the Court which rendered the judgment must be deemed to have known that real estate was to be sold and a title in fee to pass, as such a suit under the law could apply only to real estate. That is a necessary part of the decision.

And the taxes were adjudged "a valid lien on the mine (real estate) (*Forbes vs. Gracey,* 94 U. S. 762, 766).

Sale

And the advertisement of sale was of *"patented*

mines" (fee simple real estate); and so was the sheriff's deed.

Effect of Judgment

The State brought suit to foreclose a lien upon fee simple real estate and to sell it, and got judgment therefor. What the State prayed for, it received, and on the judgment it received, the Sheriff sold, and the defendant herein bought, without objection by the plaintiffs, who were represented at the sale. (Tr. p. 204, f. 152.)

Effect of Statute

And the defendants in the tax suit and the attorney for the plaintiffs herein, present at the sale, must have known that under Section 89 of the Arizona Act of 1903, the Sheriff would

> "execute to the purchasers of *real estate* sold * * * a deed for the property so sold * * * which shall convey a *title in fee* to such purchaser of the *real estate* therein named, and shall be *conclusive evidence of* title and that the matter and things therein stated are true."

He and his clients must be deemed to have known the curative provisions of Section 105 of that Act, and the further fact that the law permitted collection only of real estate taxes by such a suit,and that by entering the judgment, the court had adjudicated that a fee title would pass.

If the judgment foreclosed the interest or title of any defendant therein, it forclosed against all

The plaintiff's contention herein is simply the paradox that there was no attempt to sell their fee title, although the petition or complaint prayed therfor and the judgment so decreed.

Why were they made defendants in the tax suit, except to bar them? Can a defendant in a mortgage foreclosure decree subsequently say collaterally, that there was no intention to bar his title or claim?

Sale was of well-known mines by name

The sale was of a well-known group of mines, known by name and general location through this part of Arizona. The slightest inquiry would have demonstrated they were on the Float. If the attorney for the plaintiffs herein had not known where the mines are, why did he attend the sale?

The plat of the Contzen survey, printed in the record of *Lane vs. Watts*, shows the Alto property within the boundaries of the Float. That map was as familiar as the alphabet to all the parties in interest and their attorneys.

There certainly is such a property as the "Alto Group of Mines," well known as such, and as mines, and the State sold the lands which bore that name.

For purposes of description by metes and bounds, reference was made to the recorded instruments, a not unusual form of conveyancing. Whether these instruments were good or bad, they certainly by reference furnished a proper specific real estate description.

The description of the property sold in *Ontario Land Co. vs. Yordy,* 212 U. S. 152, giving arbitrary block and lot numbers, was held good *"as a means of identification,* * * * liberally construed to afford the basis of a valid grant," though that could be done only by inferences, in order to make a "valid grant" at a tax sale. Are we not entitled to the same measure of judicial protection?

If the "John Doe Building" is ordered sold under a decree, with a reference to a recorded instrument of one who had no title, for specific metes and bounds, does not a good title pass to the metes and bounds specified in that instrument, if any of the defendants in the decree had a good title to those metes and bounds?

Conclusion

The tax petition, judgment, advertisement of sale and Sheriff's deed clearly describe a fee simple title to land, and the Alto Group of Mines actually constitute and did in fact constitute in 1913 *and* 1914 *an actual tract of non-Government land; and the conveyance thereof in the Sheriff's deed is sufficient and passed all the interest and title of all the plaintiffs herein thereto.*

IV

As to the Interest of the Heirs of Daisy Belle Bouldin

THE PLAINTIFFS HEREIN ARE NOT PERMITTED TO ATTACK COLLATERALLY THE SALE UNDER THE TAX JUDGMENT ON EVIDENCE ALIUNDE, AGAINST THE EXPRESS FINDING IN THAT JUDGMENT, THAT DAISY BELLE BOULDIN, ONE OF THE DEFENDANTS THEREIN, AND THEN OWNER OF RECORD OF AN UNDIVIDED ONE-HALF INTEREST IN THEIR CHAIN OF TITLE, DIED BEFORE THE TAX SUIT WAS INSTITUTED; AND PLAINTIFFS HAVE WAIVED ANY OBJECTION TO ANY SUCH DEFECT OR IRREGULARITY, AND ARE CLEARLY ESTOPPED FROM SO CONTENDING HEREIN.

Tax suit properly brought against owners of record

The Ariozna statute required that the suit be brought against the "Owners" of the land, copying the Missouri statute. That meant the owners of record, and the Bouldin title then stood of record in the names of James E. Bouldin and Daisy Belle Bouldin.

Vance vs. Corrigan, 78 Mo. 94, 97, 98.
Payne vs. Lott, 90 Mo. 676, 680, 691.
Cowell vs. Gray, 85 Mo. 169.
Allen vs. Ray, 10 S. W. 153, 96 Mo. 542.

Effect of Recital in Judgment

The judgment in the tax case recites proper service &c. on Daisy Belle Bouldin. (Tr. p. 87.)

The Arizona rule as to the effect of a judgment and its recitals seems to be as laid down in *Bryan vs. Kales*, 3 Ariz. 423, 426; 31 Pac. 517:

> "It is settled doctrine that a domestic judgment of a court of record, unless directly impeached, imports absolute verity as to every jurisdictional fact of which the record speaks, and is clothed in the conclusive presumption that every jurisdictional fact exists of which the record is silent."

As the Arizona judgment is being attacked collaterally in an Arizona Federal Court, the Arizona rule will be followed, particularly as the judgment is not *in personam* and the parties are within the same territorial jurisdiction. As the United States Supreme Court said in Hibben vs. Smith, 191 U. S. 310, 324, 325:

> "A state court has the right to place its own construction on its own judgments, and where, as in a case like this, it holds that the judgment is not void and that it cannot be attacked collaterally, we ought to follow that determination."

To the same effect is *Jetter vs. Hewitt*, 22 How. 352, 364.

The rule in many of the states allowing collateral atttack *against the recitals in the judgment as to juris-*

diction, is with respect to its *obligatory extraterritorial effect.* (*Thompson vs. Whitman,* 18 Wall. 457, 468.) This is best illustrated by the divorce cases where service is made by publication in a state other than the domicile of the defendant or the last matrimonial domicile. In such cases, other states need not recognize the decree, but most of them *through comity* do so. The comity rule is particularly applicable in this case.

Purchaser under Judgment has benefit of recitals

A purchaser at a judicial sale is not bound to look further back than the judgment of sale, if the facts necessary to give the court jurisdiction appear on the face of the proceedings. (*Thompson vs. Tolsie,* 2 Pet. 157, 168; *Davis vs. Guinea,* 104 U. S. 386, 391, 392; *Simmons vs. Saul,* 138 U. S. 439, 454, 455; *Florentine vs. Barton,* 2 Wall. 210, 217.)

Authorities on effect of death before suit

The United States Supreme Court has held, (*New Orleans vs. Gaines,* 138 U. S. 595, 611, 612), that a judgment against one who died five years prior thereto, *for rent accruing after his decease,* is not void, on collateral attack, particularly where, as at bar, the real parties in interest acquiesced therein. That is the rule in the Federal Courts, and decisive herein.

The best reasoned state court cases, particularly in actions in res or quasi in res, hold that a judgment

against one of several defendants, who died before the suit, is not void collaterally, in whole or in part, and the best text book on the subject so holds.

Van Fleet on Collateral Attack, §§587, 602, 603.
Collins vs. Mitchell, 5 Fla. 364, 367, 372.
Taylor vs. Snow, 47 Tex. 462, 468; 26 Am. Rep. 311.
Trail vs. Snoufler, 6 Md. 308, 314.
Wilcher vs. Robertson, 78 Va. 602.
Waterhouse vs. Cousins, 40 Me. 333.
Otis vs. Dencer, 116 Ind. 531; 19 N. E. 317.
Warder vs. Tainter, 4 Watts (Pa.) 270.
Carr vs. Townsend, 63 Pa. 202.
Murray vs. Weigle, 112 Pa. 159; 11 Atl. 781.
Yaple vs. Titus, 41 Pa. 195.
Watt vs. Brockover, 35 W. Va. 323; 13 S. E. 1007.

The reason of the rule is that the judgment, even though rendered on service by publication, is an adjudication that the defendant was alive at that time; from *Bryan vs. Kales, supra,* that would seem to be the Arizona rule. Perhaps the most practical explanation is that given by a Utah Court (40 Pac. 715), that the representatives of the decedent should seasonably apply to the court rendering the judgment to have it vacated, instead of disregarding it entirely or seeking to attack it collaterally. In the case at bar the representatives of the decedent not only failed to open the judgment, but fully acquiesced therein.

Chap. XIII. Jurisdiction taken over the party or person (after due appearance or service) by reason of a mistake of law or fact.

§587.

Scope of, and principle involved in. Chap. XIII.

"In the cases considered in this chapter, there was no want of power to grant the relief prayed for or given, and no want of service on the party or person, but the mistake was one of fact concerning his * * * death * * * or one of law in assuming to act where the record showed the existence of such a defect. On principle, the defects herein considered can never make the proceedings void. If the mistake is one of fact, the proceeding is invulnerable collaterally, because the record cannot be contradicted. Neither is the judgment void when the defect appears in the record. The court having power to grant the relief sought, there is no want of jurisdiction over the subject matter, and the party is before it; and the fact that the court is denied the right to proceed either for or against him, is a matter of convenience or expediency, which does not touch its power."

Dead person treated as living §602.

Principle Involved.

"Jurisdiction over the parties being shown by the record, any judgment for or against them is an implied finding that they are in life and legally competent to protect their rights. The recital usually is that the parties, either in person or by attorney, are present, or neglect, after due notice, to be present. Those are matters to be determined from the evidence; and the determination is not void because the evidence was false or insufficient. As was well said by the Supreme Court of Maryland: 'The judgment concludes all persons from denying the fact of the party's existence at the time of its entry.' (*Trail vs. Snouffler,* 6 Md., 308, 314.) So where it was contended that the decree of a Virginia court against a non-resident upon service by publication, was void because he was dead before the suit was brought, the court said: 'The record is conclusively presumed to speak the truth, and can be tried only by inspection. This results from the power of the court to pass upon every question which arises in the cause, including the facts necessary to the exercise of its jurisdiction, and as to which, therefore, its judgment * * * is binding, until reversed, on every other court. * * * The defendant Martin was proceeded against as a person in being and as a non-resident of the state. An order of publication was accordingly made, and

duly and regularly executed. Its effect, therefore, is equivalent to an averment on the record that he had, in fact, been summoned—an averment which in this *collateral* proceeding, cannot be contradicted.' (*Wilcher vs. Robertson*, 78 Va. 602), and in Pennsylvania, where the contention was that a judgment entered on a warrant of attorney in favor of the payee of the note after his death, was void, the court said: 'No authority has been shown for the position taken in this case, that judgment taken or entered in favor of a deceased party is a nullity. Even a judgment against a deceased party is not so. * * * This was an *attempt to go behind the judgment.* This he could not do, as all the cases show. In fact, to have allowed it would have been to impugn the record, which imported that the judgment was in favor of a living party.' (*Carr vs. Townsend's Executors,* 63 Pa. 202).

§603.

Death of party before suit brought

Proceedings not void.

"In a proceeding in Indiana to establish a drain, constructive notice given to the record owner of land is sufficient to withstand a collateral attack, although he was then dead—the plaintiff being ignorant of the fact (*Otis vs. DeBoer,* 116 Ind.

531, 19 N. E. 317). Then follows discussion of *Jetter vs. Hewitt,* 22 How. 352). 'The statute of Maine required notice to b served upon the creditor if *alive* and in the state. Where a debtor was discharged upon due return of service, it was held to be incompetent to prove collaterally that the creditor was *dead* before the notice was issued. (*Waterhouse vs. Cousins,* 40 Me. 353.) A judgment of revivor on a *scire facias* is not void because the defendant was dead when the writ was issued (*Warder vs. Tainter,* 4 Watts 270); nor is the foreclosure of a mortgage by *scire facias* on two returns of *nihil* void, because the mortgagor, a guardian, was dead when the suit was begun. (*Murray vs. Weigle,* 118 Pa. 159, 11 Atl. 781.) It was also decided in Texas that the death of the defendant (*Taylor vs. Snow,* 47 Tex. 462, 26 Am. Rep. 311) and in West Virginia that the death of the plaintiff (*Watt vs. Brookover*, 35 W. Va. 323, 13 S. E. 1007; *McMillan vs. Hickman,* W. Va. —, 14 S. E. 227, 231) before the suit was brought, did not make the judgment void."

In §604, the author mentions the contrary cases in Missouri, South Carolina, Massachusetts and an English case, but with disapproval.

Any Missouri case to the contrary is based on its general law, and not on its tax suit statute, and, therefore, such cases are not controlling in Arizona, partic-

ularly, as under §87 of the Arizona Act of 1903, matters of practice and procedure were specifically regulated by *Arizona general laws and statutes.*

This Federal Court, therefore, is bound by the United States Supreme Court decision in *New Orleans vs. Gaines, supra,* and *Hibben vs. Smith, supra,* as to the recognition of the general Arizona rule as to effect of the recitals in the judgment. There is apparently no Arizona authority directly in point as to the effect of the death of a defendant before suit.

Bar by Waiver and Estoppel and Lack of Tender of Purchase Price.

In its ultimate analysis, the case at bar resolves itself to the proposition: Can the heirs of one of the defendants in a judgment rendered in favor of the State of Arizona by an Arizona court of competent general jurisdiction, in an action *quasi in rem* for Arizona taxes on Arizona land, avoid the judgment collaterally as to them, in the Arizona Federal Court, when the records of Arizona at the time of the suit and sale showed that such deceased defendant was the owner of their interest in the land, and they were represented by attorney at the tax sale (Tr. p. 204) and made no objection thereto or disclosure of the defect or irregularity, and made no attempt to open the judgment, or redeem from the sale, and have not offered or tendered to the purchaser the amount of the sale price or any part thereof?

Lack of payment or tender of purchase price.

Where, as at bar, plaintiffs seek to set aside or avoid a judicial sale, after the purchaser has fairly paid its money in extinguishment of the judgment, they must first pay or tender the purchase price (*Davis vs. Gaines,* 104 U. S. 386, 405). The plaintiffs herein have not done so, and defendant herein so pleads in its amended answer to the amended complaint. (Tr. p. 12.)

In *Williams vs. Hudson,* (6 S. W. 261, 93 Mo. 524), cited by plaintiffs in error, it appeared that a tax judgment and sale had been had against several defendants, one of whom had died prior to the suit. His heirs brought suit to remove the tax sale as a cloud on their title, but the court declined to do so, saying that *the sale was not void, but* simply did not cut off their right to redeem, and as they had not offered to redeem they could not recover. That decision in itself would seem to be decisive against the plaintiffs herein.

Particularly, would such payment or tender be necessary in the case at bar, as there would undoubtedly be no right of action in the defendant herein to recover from the State of Arizona a part of the purchase price on any partial failure of title; furthermore, the conduct of the plaintiffs herein at the sale was such as to permit the defendant herein to purchase, relying on the judgment, as it was bound to do.

Waiver and Acquiescence

"Where a party knows of any fact that might constitute an objection to the regularity of the sale, which could be remedied before the sale if made known, and fails to disclose that fact, he will not later be permitted to make such fact the basis of objections to the confirmation."

24 Cyc. 36.

Hewitt vs. Great Western Co., 230 Fed. 394 399 (CCA 9th).

"It is among the elementary principles of the common law, that whoever would complain of the proceedings of a court must do it in such time as not to injure his adversary, by unnecessary delay in the assertion of his right. If he objects to the mode in which he is brought into court, he must do it before he submits to the process adopted. * * * So long as this judgment remains in force it is in itself conclusive of the right of the plaintiff to the thing adjudged, and gives him a right to process to execute that judgment. * * * No rule can be more reasonable than that the person who complains of an injury done him, should avail himself of his legal rights in a reasonable time."

Voorhees vs. U. G. Bank, 10 Pet. 447, 473, 474.

Asquiescense must be considered even though not constituting a technical estoppel; it guards purchasers at

judicial sales from astute afterthoughts (*Simmons vs. Burlington Ry. Co.*, 169 U. S. 278, 291), especially as under a recent Federal statute (Judicial Code §2748, as added by Act of March 3, 1915) an equitable defense can be interposed in a common law action.

Under Sections 592 to 595 of the Arizona Civil Code of 1913, and Sections 1480 to 1483 of its Civil Code of 1901, the plaintiffs herein had the right to apply to open the tax judgment, rendered on the service by publication, either on the merits or if they objected to the judgment *quasi in rem* against the interest of the heirs of Daisy Belle Bouldin in an action in which she, and not they, were made defendants, and prevent a sale which, under Section 89 of the Arizona Act of 1903, would pass the fee and furnish "conclusive evidence of title." This they could have done in ample time before the sale, and they had full opportunity to do so. Instead, they elected to attend the sale by attorney, without objection or disclosure. Clearly, they thereby acquiesced in the sale and waived any objections thereto or to the prior proceedings. They are also estopped on the well-known and common sense rule applied particularly at judicial sales, against one who stands by and allows his property to be sold without objection or protest against any irregularity or defect, or disclosure of any secret defense.

Estoppel in Pais

"One who stands by, while a sale is being made

of the property in which he has an interest, and makes no claim thereto, * * * is held to be estopped from setting up such claims." This applies to judicial and execution sales.

Gill vs. U. S., 160 U. S. 426, 430.
Kirk vs. Hamilton, 102 U. S. 68, 75, 76, 78, 79.
Gregg vs. Von Puhl, 1 Wall. 274, 281.
Clegg vs. Greenwood Cemetery, 107 U. S. 466, 477.
Erwin vs. Lowry, 7 How. 172, 183.

The defense of equitable estoppel is available at law to a defendant in ejectment, as legal title passes by such estoppel.

Kirk vs. Hamilton, 102 U. S. 68, 76, 78.
Drexel vs. Barney, 122 U .S. 241, 253.
Dickerson vs. Colgrove, 100 U. S. 578.
George vs. Tate, 102 U. S. 564, 570.

One who stands by and without protest allows his property to be sold at a void judicial sale, without raising any question as to the validity of the sale, and allows the purchaser to expend money in reliance on the sale, is estopped from contesting its validity, and judgment in ejectment will be against him who stood by; the good faith of such a purchaser is assumed in the absence of evidence to the contrary. (*Kirk vs. Hamilton,* 102 U. S. 68, 75, 76, 78, 79.)

The doctrine of *Dickerson vs. Colgrove,* 100 U. S. 580, and *Kirk vs. Hamilton,* 102 U. S. 68, has been followed and approved in Arizona.

Bryan vs. Pinney, 3 Ariz. 412, 421; 31 Pac. 548.
Dalton vs. Renteria, 2 Ariz. 275, 280; 15 Pac. 38.

Such estoppels run with the land; and the parties and those claiming under them, and even the courts, are bound thereby (*Porterfield vs. Clark,* 2 How. 76, 109.)

Estoppel in pais is even applied against an owner or his vendee, when a railroad company has been permitted without objection to build its railroad, although having no right on the particular land at the time; in such a case, the owner, as well as the vendee, are estopped to maintain ejectment or trespass to try title and are remitted to an action for damages. (*Roberts vs. S. P. R. R. Co.,* 158 U. S. 1, 11; *Donohue vs. El Paso & S. W. R. R. Co.,* 214 U. S. 499.)

Actual knowledge and "standing by" at a tax sale, without making any objection thereto, strongly impressed the United States Supreme Court in a tax sale case, as will appear from the statement of facts preceding the opinion of the Court. (*Ontario Land Co. vs. Yordy,* 212 U. S. 152.)

Analysis of Interests of Plaintiffs

At any rate, the judgment is against "Jane Doe Bouldin," who is or can be the plaintiff, Helen Lee Bouldin; and when the plaintiff, Weldon Bailey, Esq., got his deeds from the other plaintiffs herein it must be presumed that he took whatever interest (if any) he did take in the Alto property from the plaintiff, David

W. Bouldin, who was the only grantor who could possibly have anything to convey in the Alto property.

Furthermore, the tax judgment and sale clearly barred the community share of James E. Bouldin in the one-half interest of his wife, Daisy Belle Bouldin, on her death.

Helen Lee Bouldin's interest is clearly barred by the judgment, and so is that of James E. Bouldin.

Whatever title was attempted to be conveyed to Mr. Bailey was to a grantee with notice, who was personally present at the sale, and *personally estopped,* so there is clearly neither title nor moral equity in the plaintiffs.

V.

Answers to Various Minor Contentions

"The execution does not state the amount due for taxes and interest upon each of the claims." But the judgment, to which it refers, does make such itemization and that is all the statute required. (Assg. of E. 3 (a).)

While the notice of sale did not set forth a similar itemization (and it would be most extraordinary if it had) the judgment therein referred to contains proper itemization.

Assg. of E. 3 (b). The statute required the *judgment* to contain the itemization but not the execution,

which referred to the judgment. Besides, the sheriff usually receives a certified copy of the judgment or at least is bound to take notice of all its provisions.

"It is the well known and established rule of law in Missouri and elsewhere, that a judicial sale and title acquired under the proceedings of a court of competent jurisdiction cannot be questioned collaterally, except in case of fraud, in which the purchaser is a participant." So held where land was sold while execution stayed. (*Griffith vs. Bogert,* 59 U. S. 158.)

A judicial sale cannot be objected to because the property was sold in bulk and not in parcels, where the Sheriff first offered it separately and received no bids, and then offered and sold it en masse. (*White vs. Crow,* 110 U. S. 183.)

A sale en masse is irregular and not void and cannot be attacked collaterally.

Lewis vs. Whitten, 20 S. W. 617, 619 (Mo.).

Norman vs. Eastburn, 130 S. W. 276, 281 (Mo.).

A sale after the return day on a levy made prior thereto is good. "On this point the court can only express its surprise that any doubt could be entertained."

Wheaton vs. Sexton, 4 Wheat. 502.

Webster vs. Woolbridge, 29 Fed. Cases No. 17340 (a Mo. Statute).

Remington vs. Lenthicum, 14 Pet. 84, 92.

U. S. vs. Hogg, 112 Fed. 909, 910; C. C. A. 6th Ct., Lurton, J.

Hensen vs. Peter, 164 Pac. 512.

Mason vs. Bennett, 52 Fed. 343, 344.

This is particularly true when the judgment ordered the sale of specific property (*Lumber Co. vs. Hotel Co.,* 29 P. 627; 94 Calif. 217).

The judgment debtor may by parol or silence, waive a provision for sale in parcels or any other irregularity.

Hudenoohl vs. Liberty Hill Co., 29 P. 1025 (Calif.) and cases cited.

17 Cyc. 1049.

17 Cyc. 1269.

24 Cyc. 36.

CONCLUSION

If ever equities for a defendant were present in a record they are in this case.

Not a dollar of the plaintiffs' money was ever spent on the Alto. What that property is, or rather was, represents the investment of other people.

At the tax sale, with the attorney for the plaintiffs herein standing by and making no protest or disclosure, at a sale advertised for fourteen consecutive weeks, under a judgment rendered over seven months prior thereto by the highest court of original jurisdiction of

the State of Arizona, in a suit brought by the sovereign State of Arizona, to enforce its sovereign right to collect taxes, at a time when Santa Cruz County sorely needed the money, the defendant herein, successor in a way to a heavy investor in the Alto companies, bought the property. Nineteen months thereafter it received its deed.

There has never been any direct attack on the tax judgment, nor even any attempt to open it and allow the plaintiffs herein to defend, although the sale took place over seven months after the judgment and the plaintiffs herein had not only constructive but full actual notice, and were represented by counsel at the sale.

When defendant asks judgment herein in its favor, it seeks not only what the law clearly gives it, but what every principle of justice and fair play demands.

Respectfully submitted,

BEN C. HILL,

Attorney for Defendant in Error.

APPENDIX

No. 92. AN ACT

To Amend Chapter VII of Title 62 of the Revised Statutes of Arizona, 1901, Entitled "Collection of Delinquent Taxes."

Be it Enacted by the Legislative Assembly of the Territory of Arizona:

Section 1. That Chapter VII of Title 62 of the Revised Statutes of Arizona, 1901, be and the same is hereby amended so that said Chapter shall read as follows:

Section 79. At the meeting of the County Board of Supervisors at which the several delinquent lists are required by law to be returned and certified, the said Board of Supervisors shall examine and compare the list of lands and town lots on which the taxes remain due and unpaid; and if any such lands or town lots have been assessed more than once, or if said lands or town lots are not subject to taxation, or if the legal subdivision be incorrectly described, in all such cases the said Board of Supervisors shall correct such error by the best means in their power and cause the lists so

corrected to be certified and filed in the office of the clerk of the Board of Supervisors, and shall also cause the amount of the Territorial and county taxes to be certified to the Auditor of the Territory.

Section 80. All real estate upon which the taxes remain unpaid on the second Monday in December, annually, shall be deemed delinquent, and the tax collector shall proceed to enforce the lien of the Territory thereon, as required by this chapter, and any failure to properly return the delinquent list, as required by this chapter, shall in no way affect the validity of the assessment and levy of taxes nor of the judgment and sale by which the collection of the same may be enforced, nor in any manner to affect the lien of the Territory nor on such delinquent real estate for the taxes unpaid thereon.

Section 81. The clerk of the Board of Supervisors shall file the said lists in his office and within ten days thereafter make the same into a "back tax book," as contemplated by Section 84, under the seal of the Board of Supervisors, and deliver the same to the tax collector of his county, whose duty it shall be to proceed to collect the same, and to that end shall have the power, and it is hereby made his duty, to levy upon, seize and distrain personal property and sell the same for such taxes. And if it appears that any Board of Supervisors, or clerk of such board, of this Territory has, within five

years next before the taking effect of this section, failed in the discharge of the duties prescribed by Sections 79 and 84 of this chapter, or shall so fail at any time hereafter, to such an extent that the collection of said taxes cannot be enforced by law, it shall be the duty of said Board of Supervisors and said clerk, or their successors in office, immediately after such omission or defect is discovered, to proceed at once to correct the same and supply the omission or defect and return such corrected "back tax book" to the collector, whose duty it shall be to collect the same, as hereinbefore and hereinafter set forth.

Section 82. The taxes due and unpaid on any real estate which has heretofore been returned delinquent and which has not feen forfeited to the Territory, and the taxes due and unpaid on any real estate which has been forfeited to the Territory for the non-payment of such taxes, shall be deemed and held to be back taxes, and the lien theretofore created in favor of the Territory of Airzona is hereby retained on each such tract and lot of real estate to the amount of the taxes due thereon and also the interest and costs accruing under this chapter.

Section 83. Immediately after the taking effect of this chapter, the tax collector of each county shall return to the Board of Supervisors of his county, all delinquent and forfeited lists of tax bills of real estate

in his hands, except taxes due prior to the year 1888, which taxes the clerk of the Board of Supervisors is hereby authorized to strike from the forfeited list, marking thereon all collections made, and shall at the next regular meeting of the Board of Supervisors make settlements for such collections.

Section 84. Within sixty days after the taking effect of this chapter, and every year thereafter, within thirty days after the settlement of the tax collector, the several clerks of the County Boards of Supervisors in each county in this Territory, shall make in a book to be called the "back tax book," a correct list in numerical order of all tracts of land and town lots on which back taxes shall be due in such county, city or town, setting forth opposite each tract of land or town lot the name of the owner, if known, and if the owner thereof be not known, then to whom the same was last assessed, the description, supervisor of his county, all delinquent and forfeited lists of tax bills, of real estate in his hands, except taxes due prior to the year 1888, which taxes the clerk of the Board of Supervisors is hereby authorized to strike from the forfeited list, marking thereon all collections made, and shall at the next regular meeting of the Board of Supervisors make settlements for such collections.

Section 84. Within sixty days after the taking effect of this chapter, and every year thereafter, within thirty

days after the settlement of the tax collector, the several clerks of the County Boards of Supervisors in each county in this Territory shall make in a book to be called the "back tax book" a correct list in numerical order of all tracts of land and town lots on which back taxes shall be due in such county, city or town, setting forth opposite each tract of land or town lot the name of the owner, if known, and if the owner thereof be not known, then to whom the same was last assessed, the description thereof, the year or years for which such tract of land or town lot is delinquent or forfeited and the amount of the original tax due each fund on said real estate (and the interest due on the whole of said tax, at the time of making said "back tax book," together with the clerk fees then due) in appropriate columns arranged therefor and the aggregate amount of taxes, interests and clerk fees charged against each tract of land or town lot for all the years for which the same is delinquent or forfeited. Said "back tax book" when completed shall be delivered by the said clerk to the tax collector of the county, for which he shall take duplicate receipts, one of which he shall file in his office and the other with the Auditor of the Territory, and the clerk of the Board of Supervisors shall charge such tax collector with the aggregate amount of taxes, interest and clerk fees contained in said "back tax book." All taxes, interest and clerks' fees hereinafter contained in the "back tax book" herein described, shall bear interest from the time of making out said "back tax

book" at the rate of ten per cent per annum until paid. In computing interest under this chapter, a fraction of a month shall be counted as a whole month.

Section 85. The tax collectors of the respective counties shall proceed to collect the taxes contained in such "back tax book" as herein required, and any person interested in, or the owner of any land or town lot contained in said "back tax book" may, on or before the 31st day of December, A. D. 1903, redeem such tract of land or town lot, or any part thereof, from the Territory's lien thereon, by paying to the tax collector the amount of the original taxes, as charged against such tract of land or town lot or any part thereof, from the Territories in lien thereon, by paying to the tax collector the amount of the original taxes, as charged against such tracts of land or town lots described in said "back tax book," together with interest in the same from the 1st day of January, A. D. 1901, at the rate of ten per cent per annum, and the costs accruing under this chapter; provided, that if suit shall have been commenced against any person owing taxes on any tract of land or town lot contained in said "back tax book" for the collection of taxes due on the same, the person desiring to redeem any such tract of land or town lot shall, in addition to the original tax and the interest, and costs accruing under this chapter, pay all necessary costs incurred in the court where the said suit is pend-

ing, together with such attorney's fees as the Court may allow.

Section 86. If on the 1st day of January, A. D. 1904, any of said lands or town lots contained in said "back tax book" remain unredeemed, it shall be the duty of the tax collector to proceed to enforce the payment of the taxes charged against such tract or lot by suit in the courts of competent jurisdiction of the county where the real estate is situated, which same court shall have jurisdiction without regard to the amount sued for, to enforce the lien of the Territory, and for the purpose of prosecuting suit for taxes under this chapter the collector shall have power, with the approval of the County Board of Supervisors, to employ such counsel as he may deem necessary, who shall receive as fees in any suit such sum, not to exceed twenty-five per cent of the amount of the tax actually collected and paid into the treasury, as may be agreed upon in writing and approved by the County Board of Supervisors before such services are rendered, which sum shall be taxed as costs in the suit and collected as other costs, and no such attorney shall receive any fee or compensation for such service except as in this section provided, and it shall be the duty of the tax collector when suit shall have been commenced against any tract of land or town lot in said "back tax book" to note opposite said tract of land or town lot such fact, also against whom suit has been commenced.

Section 87. All actions commenced under the pro-

visions of this chapter shall be prosecuted in the name of the Territory of Arizona, at the relation and to the use of the tax collector, and against the owners of the property; and all lands owned by the same person may be included in one petition and in one count thereof, for the taxes for all such years as taxes may be due thereon, and the said petition shall show the different years for which taxes are due, as well as the several kinds of taxes or funds to which they are due, with the respective amounts due to each fund, all of which shall be set forth in a tax bill of said back taxes, duly authenticated by certificate of the tax collector and filed with the petition, and said tax or bills, so certified, shall be prima facie evidence that the amount claimed in said suit is just and correct, and all notices and process in suit under this chapter shall be sued out and served in the same manner as in civil actions in district courts, and in case of suit against non-residents, unknown parties, or other owners on whom service cannot be had by ordinary summons, the proceedings shall be the same as now provided by law in civil actions affecting real or personal property. In all suits under this chapter, the general laws of this Territory as to practice and proceedings in civil cases shall apply so far as practicable and not contrary to this chapter.

Section 88. The judgment, if against the defendant, shall describe the land upon which the taxes are found to be due, shall state the amount of taxes and interest

found to be due upon each tract or lot, and the year or years for which the same are due, up to the rendition thereof, and shall decree that the lien of the Territory be enforced, and that the real estate, or so much thereof as may be necessary to satisfy such judgment, interest and costs, be sold, and execution shall be issued thereon, which shall be executed as in other cases of judgment and execution, and said judgment shall be a first lien upon said land.

The clerk of the district court shall, upon application of the tax collector or attorney, issue the execution herein provided for, describing the real estate named in the judgment, and directed to the sheriff, and commanding him to levy upon, advertise and sell said property, or so much thereof as may be necessary to pay said judgment and subsequent costs, the same as sheriffs might do under ordinary execution.

Section 89. The sheriff shall execute to the purchasers of real estate, sold under this chapter, a deed for the property so sold, which shall be acknowledged before some officer authorized by law to take acknowledgements of deeds, as in ordinary cases, and which shall convey a title in fee to such purchaser of the real estate therein named and shall be conclusive evidence of title and that the matter and things therein stated are true. In case any person shall be in possession of the real estate which may be sold as herein provided, the

district court or the judges thereof out of term time, upon application, shall cause a writ of possession to be issued, placing the purchasers of his assigns in possession.

Section 90. When real estate has been sold for taxes, costs or penalties by the sheriff of any county within the Territory of Arizona and the same sells for a greater amount than the taxes and all costs and penalties in the case, and the own or owners, agent or agents cannot be found, it shall be the duty of the sheriff of the county, when such sale has been made or may hereafter be made, to make a written statement describing each parcel or tract of land sold by him for a greater amount than the taxes and all costs and penalties in the case, and for which no owner or owners, agent or agents can be found, together with the amount of surplus money in each case, which statement shall be subscribed and sworn to by the sheriff, making the same before some officer competent to administer oaths in this Territory, and then presented to the County Board of Supervisors of the county where such sale has been made or may hereafter be made, and on the approval of the statement by the Board of Supervisors, the sheriff making the same shall pay the said surplus money into the county treasury, take the receipt in duplicate of said treasurer for said overplus of money, and retain one of said duplicate receipts and file the other with the County Board of Supervisors, and thereupon the clerk of the

Board of Supervisors shall charge said treasurer with said amount, and said treasurer shall place said money to the credit of the school fund of the county, to be held in trust for the term of ten years for the owner or owners or their legal representatives. And at the end of ten years, if such fund shall not be called for, then it shall become a permanent school fund of the county. County Boards of Supervisors shall compel owners or agents to make satisfactory proof of their claims before receiving their moneys; provided, that no county shall pay interest to the claimant of any such fund.

Section 91. Whenever it shall appear to any County Board of Supervisors that any tract of land or town lot contained in said "back tax book" is not worth the amount of taxes, interest, cost and penalties due thereon, as charged in said "back tax book," or that the same would not sell for the amount of said taxes, interest, cost and penalties, it shall be lawful for said Board of Supervisors to compromise said taxes with the owners of said tract of land or town lot, and upon payment to the tax collector of the amount agreed upon, a certificate of redemption shall be issued under the seal of the County Board of Supervisors, which shall have the effect to release said lands from the lien of the Territory and all taxes due thereon as charged on said "back tax book," and in case said Board of Supervisors shall compromise and accept a less amount than shall appear to be due on any tract of land or town lot as charged

on said "back tax book," it shall be the duty of the said Board of Supervisors to order the amount so paid to be distributed to the various funds to which said taxes are due, in proportion as the amount received bears to the whole amount charged against such tract or lot; provided, the County Board of Supervisors may order that no suit be brought on any specified tract, if, in the judgment of said Board of Supervisors, such tract is not worth or will not bring the taxes, interest and costs; and provided, further, that the County Board of Supervisors of any county may direct that any tax or fund, the validity of which is being tested in the courts, may be omitted from any suits brought under this chapter, but the judgment rendered in any action where such tax is omitted shall not bar or affect any subsequent action for such tax so omitted whenever the County Board of Supervisors may direct an action to be brought for such omitted tax.

Section 92. All suits instituted under the provisions of this chapter shall be tried at the return term of the summons, unless continued for good cause shown.

Section 93. Fees shall be allowed for services rendered under the provisions of this chapter as follows:

To the tax collector, four per cent of all sums collected, such per centum to be fixed as costs and collected from the party redeeming.

To the clerk of the County Board of Supervisors for making the "back tax book," twenty-five cents per tract or town lot, to be taxed as costs and collected from the party redeeming such tract or town lot.

To the district court clerk, sheriff and printer such fees as are allowed by law for like services in civil cases, which shall be taxed as costs in the case; provided, that in no case shall the Territory or county be liable for any such costs, nor shall the County Board of Supervisors or Territorial Auditor allow any claim for costs incurred by the provisions of this chapter.

Section 94. Any party interested in any tract of land or town lot may pay the taxes, interest and costs thereon after the commencement of suit, and before sale, by paying to the tax collector the amount of such taxes and interest, and by payment to the district court clerk of all costs thereon; and if execution has been issued the same may be paid to the sheriff, who shall forthwith pay such taxes and interest to the tax collector, and the costs to whom the same are due.

Section 95. The collector shall make diligent endeavor to collect all taxes upon said "back tax book," and whenever he finds that any taxes therein have been paid, he shall report that fact to the County Board of Supervisors, giving the name of the officer or person to whom such taxes were paid, and he shall also report to the Board of Supervisors all cases of double assess-

ment or other errors, and thereupon the Board of Supervisors shall cause the necessary action to be taken and entries to be made.

Section 96. All back taxes, of whatever kind, appearing due upon delinquent real estate, shall be extended in the "back tax book" made under this chapter, and collected by the tax collector under authority of this chapter.

Section 97. No action for recovery of taxes against real estate shall be commenced, had or maintained unless action therefor shall be commenced within five years after delinquency, excepting taxes now delinquent, on which suit may be commenced at any time within five years after this chapter shall take effect, but not thereafter.

Section 98. The sheriff may appoint the tax collector his deputy sheriff, and when so appointed he may serve all process in suits commenced under this chapter with like effect as the sheriff himself might do.

Section 99. Hereafter, as often as any delinquent tax list or tax bills shall be received by the Board of Supervisors from tax collectors at their annual settlements, the same shall be made by the clerk of the Board of Supervisors into a "back tax book" containing the same facts and in the same form as provided in Section 84, as to lands, city and town lots now delinquent, and said book shall be delivered to the tax collector. The

tax collector shall proceed to collect th taxes due thereon, but shall not bring suit thereon for sixty days after such taxes become delinquent, but thereafter he shall proceed with such delinquent taxes in all matters the same as provided in this chapter in reference to taxes now delinquent. All taxes hereafter becoming delinquent shall bear one per cent interest per month from the time they become delinquent until paid, and shall also be subject to the same fees, commissions and charges as in this chapter provided for taxes now delinquent, except that for making the same in the "back tax book" the clerk who makes such book shall receive only fifteen cents per tract, city or town lot. In computing interest under this section, a fraction of a month shall be counted as a whole month.

Section 100. Nothing in this chapter shall be so construed as to prevent the institution of suit before the times herein named, provided that if it be real estate in any county of this Territory, and the owner thereof is about to remove from such county, or, being a nonresident of such county, comes within the same, so that personal service can thereby be had upon him.

Section 101. Any person hereafter putting a tax deed on record in the proper county shall be deemed to have set up such a title to the land describd therein as shall enable the party claiming to own the same land to maintain an action for the recovery of the possession

thereof against grantee in deed, or any person claiming under him, whether such grantee or person is in actual possession of the land or not.

Section 102. Any failure to make or complete the "back tax book" within the time required herein, or any informality in making said "back tax book" shall in no way affect the validity of the same.

Section 103. The assessment book and all books, papers and records in the office of the clerk of the Board of Supervisors appertaining to the subject of taxation, or copies thereof, duly certified by such clerk, shall be evidence in all courts in all controversies concerning the validity of the sales of lands for taxes.

Section 104. In all advertisements, notices, lists, records, certificates, deeds or other papers required to be made by or under the provisions of this chapter, it shall be lawful to use letters, figures and characters as follows:

Letters may be used to denote townships, ranges, boundaries, parts of sections, parts of lots, blocks or other subdivisions of real estate in th following manner: T. for township, R. for range, L. for lot, B. for block, N. for north, E. for east, S. for south, W. for west, or any combination or combinations of the four last mentioned letters to denote parts of sections, lots, blocks or other subdivisions of real property.

Figures may be used as may be requisite to state any number required, whether it be township, range, survey, section, block, lot or part thereof, acres or fraction thereof, date of any kind, amount of taxes, interest or costs, or any other matter or thing which may be stated or given in figures. Characters such as ", " of the words "do" or "ditto" or "same" may be used to denote continuation of township, range, years, tax due or other dates, and when either shall be so used shall be deemed and held to denote the same as shall stand next above in the column in which any such character or word shall be so placed. Any and all descriptions of real estate made under the provisions of this chapter by the use of letters, figures and characters as provided in this section, when so made that the land or lot may be identified and located, shall be deemed and held to be good, valid and complete, as though the same had been written out in full. Dates of valuation and narration, taxes, interest, costs, acres or lots, or any fraction thereof, or any number or amount when stated in figures, letters or characters, as herein provided, shall be deemed and held to be fully and fairly stated, as though the same had been written out in full.

Section 105. No irregularity in the assessment roll, or omission from the same, or mere irregularity of any kind in any of the proceedings, shall invalidate any such proceeding or the title conveyed by the tax deed, nor shall any failure of any officer or officers to perform the

duties assigned him or them on the day or within the time specified, work any invalidation of any such proceedings, or of any such deed, and no overcharge as to a part of the taxes or costs, and payment of such taxes or costs, shall invalidate a sale for taxes, except as to a part of the real estate sold to the proportion of the whole thereof as such part of the taxes and costs is to the whole amount for which land was sold. Acts of officers de facto shall be valid as if they were officers de jure, and if a deed would be valid as to the sale for any one tax, it shall not be impaired by any irregularity, error in the proceeding, or sale for any other tax or taxes.

Section 2. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

Approved March 19th, 1903.

4209

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

James E. Bouldin, David W. Bouldin, Helen L. Bouldin (now Bransford), and Weldon M. Bailey,
Plaintiffs in Error.

vs.

Alto Mines Company, a corporation,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR

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Attorneys for Plaintiffs in Error.

Filed this.....day of April, 1924.

.....
Clerk of the United States Court of Appeals,
Ninth Circuit.

ACME-TUCSON

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES E. BOULDIN, DAVID W. BOULDIN, HELEN L. BOULDIN (now Bransford), and WELDON M. BAILEY,
Plaintiffs in Error.

vs.

ALTO MINES COMPANY, a corporation,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR

STATEMENT OF THE CASE

This case involves the title to a portion of th etract of land known as Baca Location No. 3, situated in Santa Cruz County, Arizona. This tract of land has been before the court numerous times and the historical facts are set forth in the opinions of the Supreme Court in *Shaw vs. Kellog,* 170 U. S. 312; *Mase vs. Herman,* 183 U. S. 572; *Priest vs. Las Vegas,* 232 U. S. 604, and *Lane vs. Watts,* 234 U. S. 525, and in the opinion of this court in *Wise vs. Watts,* 239 Fed. 207. Such a

full and clear statement of its origin and history is contained in the latter case that we do not believe it necessary to do more than to ask the court to refer to the opinion in that case.

While the grant was still in controversy before the Department of the Interior, and while that Department treated the lands as a part of the public domain, certain mining locations were attempted thereon, under the laws relating to such locations upon the vacant mineral lands of the United States. In the years 1910 and 1911 the Territory of Arizona and in 1912 the State of Arizona levied and assessed taxes against these mining claims as "patented mines," although no patents appear to be in existence, as the property of Consolidated Mines, Smelter & Transportation Company (Tr. p. 37 to 40). The taxes were not paid, and in 1913 a suit was brought to collect them. The Consolidated Transportation Company and various other corporations and individuals were made defendants, and among them James E. Bouldin and Daisy Belle Bouldin. Service was made by publication. Daisy Belle Bouldin was dead at the time the suit was brought, having died in 1907 (Tr. p. 206). James E. Bouldin resided in Texas. At the time the taxes were assessed the claim to the North half of Baca Location No. 3, upon which these mining claims were located, was owned by James E. Bouldin and the minor heirs of Daisy Belle Bouldin, David W. Bouldin and Helen Lee Bouldin (Tr. p. 28-29).

Default was taken (Tr. p. 85) and judgment was rendered ordering a sale of the mining claims ,describing them by name and by the books and pages of the County records wherein the location notices appeared.

This is an action in ejectment. Judgment was rendered for defendant, a motion for a new trial was made and overruled, and the case is here by writ of error.

ASSIGNMENT OF ERRORS

1. That the Court erred in holding and deciding that the property described in the plaintiff's complaint, or any portion thereof, was subject to taxation by the Territory of Arizona for any year prior to the year 1914, when it was segregated from the public domain, for the reason that prior to the year 1914 said property had not been segregated from the public domain of the United States and taxation thereof by the Territory of Arizona was not authorized, but was contrary to the Constitution and laws of the United States.

2. That the Court erred in holding and deciding that the judgment of the Superior Court of the County of Santa Cruz, State of Arizona, foreclosing liens for taxes for the years 1910, 1911 and 1912, is a valid judgment against the plaintiffs herein and that the sale thereunder is a valid sale and that the said judgment and said sale may not be collaterally attacked, for the reason that during all of

the years for which said taxes were attempted to be levied said property was not subject to taxation by the Territory of Arizona, it not having been segregated from the public domain of the United States; and for the further reason that said taxes were purported to be levied against said property as mining claims which had been located upon public lands of the United States, while in fact said property and all thereof had prior to said attempted location of said mining claims, been granted by the United States and title thereto had vested in the plaintiffs in error, or their grantors, although said lands had not been segregated from the public domain; and for the further reason that the judgment rendered in said Superior Court was and is invalid in the following particulars:

(a) The assessments for the year 1910 are to the Consolidated Mines, Smelter & Transportation Company, and for the year 1912 are to the Alto Copper Company, Albert Steinfeld and H. S. Guerrin, Receivers, and not to plaintiffs in error or their predecessors in title or to any of them.

(b) The descriptions in said assessments were of the mining locations such as are made on the vacant public mineral lands of the United States, and do not describe the lands of the plaintiffs in error or their predecessors in title as the same were granted by the United States, and are insufficient to give notice to the true owners.

3. The Court erred in holding and deciding that the deed made by the Sheriff conveyed the title of the plaintiffs in error or their grantors, for the reason:

(a) The execution does not state the amount due for taxes and interest upon each of the so-called mining claims, and directs the Sheriff to levy upon and sell as under ordinary execution.

(b) The execution does not set forth the amount due upon each separate tract, as is required by law. The Sheriff without right sold eight of the so-called mining claims in one lot for a lump sum, and not separately, for the taxes found to be due upon each separate tract, thus preventing redemption of one without redeeming all.

(c) The levy was only upon mining claims and the sale conveyed no interest in the lands granted by the United States to the grantors of the plaintiffs in error, but only such interest, if any, as was obtained by attempted mineral locations.

(e) The purchase by the Alto Mines Company at the Sheriff's sale operated merely as payment of the taxes.

4. The Court erred in holding and deciding that the one-half interest in the property owned by Daisy Belle Bouldin at the time of her death and which descended to her children, Helen L. Bouldin and David W. Bouldin, was affected by said judg-

ment of said Superior Court of Santa Cruz County, Arizona, or by the sale made thereunder, for the reason that at the time of the institution of said suit in said Superior Court Daisy Belle Bouldin was dead and her heirs, Helen L. Bouldin and David W. Bouldin, were not parties to said action in said Superior Court.

5. That the Court erred in rendering judgment for the defendant in error Alto Mines Company and in not rendering judgment in favor of plaintiffs in error, for the reasons heretofore stated.

ARGUMENT

LAND GRANTED BY THE UNITED STATES TO BE SELECTED FROM THE PUBLIC DOMAIN IS NOT SUBJECT TO TAXATION BY A STATE UNTIL THE LAND HAS BEEN SEGREGATED FROM THE PUBLIC DOMAIN BY AN APPROVED SURVEY, AND THE ATTEMPT TO TAX SUCH LAND BY THE TERRITORY AND STATE OF ARIZONA, PRIOR TO SUCH SURVEY, IS THE EXERCISE OF AN AUTHORITY REPUGNANT TO THE ENABLING ACT OF CONGRESS OF 1910, AND THE CONSTITUTION AND LAWS OF THE UNITED STATES, AND AN UNWARRANTED INTERFERENCE BY THE STATE WITH THE PROPERTY OF THE FEDERAL GOVERNMENT.

Upon this point there is no question as to the construction of statutes of the Territory or State of Arizona, or as to whether the taxes complained of were laid in conformity with such statutes, but the question is whether the Territory or State has the power and authority to assess, levy upon and sell land which has not been segregated from the public domain.

Nor is the question of taxation of an equitable title or claim to particular specific land involved, for such matters may arise only after the land has been in some lawful manner segregated from the public demain. At the time the assessments were made the following conditions existed:

Congress had made a grant of a quantity of land, to be selected by the grantees and located and surveyed by the Government, the granting act expressly providing for the survey. A selection had been made, which was described in general terms as beginning at the base of a mountain. The selection in 1864 had been approved and ordered surveyed, but no survey had been made, and none was made until 1905. This survey was not filed nor approved until December 14, 1914, long after the assessments were made. In 1900, the Land Department had held that the land covered by the Mexican grants was not within the terms of the Act of June 21, 1860, supra, and had thrown it open to the public for entry; and in 1908, the entire selection had been cancelled. The claimants were not in possession of any

land, the whole of it being in possession of settlers claiming under the public land laws and others. Not only were the claimants out of possession, but they were unable to obtain possession by any judicial process. From these facts, the following main conclusions may be had: (1) Although the grantees had made selection, and the Commissioner in 1864 had approved it, the grant stood cancelled, and also the title had not been attached to any particular land distinguishable from the public domain. The grantees were engaged in a contest with the government in an endeavor to obtain title. These conditions continued until the approval of the survey, under the mandate of the Supreme Court, December 14, 1914. (2) The claimants were not in possession of any land and could not get possession until the decision of the Supreme Court, and the approval and filing of the survey. In other words, notwithstanding the selection and its approval, and the passing of title to a general tract, the grant remained cancelled and the land remained public domain until after the decision of the Supreme Court in *Lane vs. Watts,* 234 U. S. 525, and until the lands were segregated by the filing and approval of the survey.

The Supreme Court has held, in cases arising under Section 6 of the Act of June 21, 1860, granting lands to the Bacas in lieu of the Las Vegas Grant, that a survey was essential to segregate the land granted from the public domain.

In *Shaw vs. Kellogg*, 170 U. S. 312, selection No. 4 of the series was involved. In that case selection had been made, survey executed, approved by the Land Department, and the land segregated from the public domain. No patent had been issued, and the question arose whether the act of the Deparrtment was final or not. The Court say:

> "The Grantees, the Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant. Nor were they at liberty to select lands which were then known to contain minerals. * * * The selection was to be made within three years. The title was then to pass. * * * The Surveyor General of New Mexico was directed to make survey and location of the lands selected. * * * There was not, at the time of these transactions, and has not since been, any statute specifically authorizing a patent for this land. Sec. 2447, Rev. Stat., taken from the Act of December 22, 1854, c. 10, 10 Stat., 599, applies only to the case of a claim to land which has heretofore been confirmed by law. And the same may be said as to the Special Act of March 3, 1869, c. 152, 15 Stat., 342. Here there had been no claim confirmed to any tract of land, but only the grant of a right to locate. * * * The Land Department was therefore technically right when it said that the statute did not order the issue of a patent, and

> that the case was one in which the granting act, with the approved survey and location, made a valid transfer of title."

In the litigation which culminated in the Supreme Court in *Lane vs. Watts,* 234 U. S. 525, where this particular selection was before the Court, it was contended by the grant claimants that while title had passed by the approval of the Commissioner and order of survey of 1864, that title had not passed to any definite or certain piece of land, and could not be affixed without a survey; that, for this reason, it was absolutely essential in order to give title to some definite and defined piece of land, that the survy made in 1905 be filed and approved; that until this survey was filed and approved, there was no segregation from the public domain. The Court say:

> "We agree with the courts below that a survey was necessary to segregate the lands from the public domain. *Stoneroad vs. Stoneroad,* 158 U. S. 240. This was done by the Contzen survey, which, we have seen, was directed to be filed by the lower courts without alteration, a decision which we approve."

If, as stated by the Supreme Court, a survey was necessary to segregate the lands granted from the public domain, it must follow that until such survey was made, the land was not segregated and remained a part of the public domain. Therefore, when the assess-

ments for taxes were made, the survey not having been filed or approved, but, on the contrary, the entire grant cancelled and rejected, the land was a part of the public domain. The situation is the same, in so far as the character of the land is concerned, at the times the assessments were made, as if no survey had ever been made, prior to this date.

The fact that the survey was made in the field in 1905, is of no importance. Since April 17, 1879, all surveys, to be of any efficacy, must be approved by the Commissioner, and filed.

Wilson Cyprus Company vs. Del Poso, 236 U. S. 635.

In *Stoneroad vs. Stoneroad,* 158 U. S. 240, a confirmed Mexican grant had been surveyed. The survey differed from the natural boundaries of the grant existing at the time of confirmation, and also a contention was made that the survey was illegal. The Supreme Court, speaking by its Chief Justice, said:

> "We think the confirmatory act of 1860, by necessary implication contemplated that the confirmed grant should be thereafter surveyed, and that such survey was essential for the purpose of definitely segregating the land to which the right was confirmed from the public domain, and thus finally fixing the extent of the rights of the owners of the land. To hold otherwise would be to conclude that Congress had confirmed the claim and yet deprived the claimant of all definite means

of determining the extent of his possession under the confirmed title."

"It is not to be presumed that Congress intended by confirming a grant which had never been surveyed and had therefore, never been distinctly separated from the public domain, to exempt it from the survey essential to its accurate segregation and delimitation, especially when this survey was fully provided for by the general law, in accordance with the uniform public policy of the Government in dealing with questions of this character. * * * Indeed, the idea that the Act, while confirming the title, did not contemplate a survey for making its limits, amounts to the contention that the public domain itself should remain in part forever unsurveyed and undetermined, since a separation of the private claim from the public domain was essential to the ascertainment of what remained of the latter."

"Now, if the survey is illegal and is to be treated as not existing, then we are without the guidance provided by law for the purpose of ascertaining whether the land claimed from the defendant was within or without the area of the grant. In other words, if it be conceded that there is no survey, the plaintiff is without right to relief, since a survey was essential to carry out the confirmatory act."

It will be observed that the title to the lands in question was in the owners of the Mexican Grant, but it was essential that this title be fixed to some particular land, and this could be accomplished only by a survey.

The distinction between the passing of title and segregation of land from the public domain, is clear. As said by the Court, in *Russell vs. Maxwell Land Grant Co.,* 158 U. S. 253, "The survey is one thing and the title another." Grants made by Congress are often in praesenti. Such words as "there be and is hereby granted" are words of immediate donation, and title passes. Leavenworth, etc., Railroad Co. vs. U. S., 92 U. S. 741. Such grants vest a present title, but the survey is essential to give precision to it, and to segregate it from the great mass of the public domain and attach the title to a particular tract. Until the survey has been accomplished and approved, it is the same as if no survey had been made, and the land remains a part of the public domain. It is not the passing of title, but the segregation of the lands, so as to distinguish them from the surrounding public domain, that renders them subject to taxation.

In *United States vs. Montana Lumber Company,* 196 U. S. 753, the Supreme Court said:

> "They (the words 'there be and is hereby granted') vest a present title, though a survey of the lands and a location of the road are necessary

> to give precision to it and attach it to any particular tract. The right of survey is in the United States."

In 1910, 1911 and 1912, therefore, the land in question had not been segregated from the public domain. We believe it to be practically universally held that such lands are not subject to taxation. That line of cases which holds that beneficial titles and beneficial interests may be taxed is clearly distinguishable from the case here. Where the public domain has been surveyed, and equitable titles are initiated, such titles, under some circumstances, may be taxed. In such cases the land has been segregated and the equitable or possessory right is affixed to a certain definite tract. That situation is entirely different from one in which a title may exist, but which has not been affixed to any particular tract of land, and is subject to be placed where the United States may place it, when surveyed, and which has no separate existence until it has been surveyed and located upon the face of the earth.

> "There is, in fact, no such tract of land as that described in the petition until it has been located within the Congressional township by an actual survey and the establishment of the lines under the authority of the United States, and the survey has been approved by the proper U. S. Surveyor General."

Middleton vs. Low, 30 Cal. 605.

In the case of *Territory vs. Persons,* 76 Pac. 316, Supreme Court of New Mexico, there was involved the right of the Territory to tax a Mexican Grant which had been confirmed by the Court of Private Land Claims, but the survey of which had not been approved.

> "The cases above cited, and many others to which reference might be made, conclusively show that without a duly approved survey the decree of the Court of Private Land Claims declaring the validity of the grant in controversy did not become legally effective to pass the title to the land out of the United States. The want of an approved survey is all the more important when it is remembered that the land is being considered from the standpoint of taxation. To constitute a proper subject for taxation, the property must be definite and clearly defined. There must be boundaries from which it is possible to accurately ascertain the premises and the purchaser's rights should a sale for taxes become necessary. In the case of this grant, there can be nothing of this kind in advance of an approved survey. It is true that the complaint speaks of 42,891 acres, more or less, and refers for a more complete description of the tract to 'the description and boundaries thereof on file in the office of the Surveyor General of New Mexico.' But that description and those boundaries were at the date of assessment purely tentative; the survey which embodied them not having been

approved, *non constat*, but that survey, when subsequently presented to the land court was rejected; and that the location of the boundaries and quantity upon which a tax levy is now predicated was declared erroneous. The survey just referred to was not final, and it must be admitted that it was within the power of the land court to reject it. If so, an affirmance of this judgment and a sale of the property for taxes, according to the 'description and boundaries' in the office of the Surveyor General at the date of the assessment, would attempt to convey property that the court subsequently held to belong, not to the claimant, but to a part of the public domain.

"In sustaining the validity of a tax levied upon and assessed against an imperfect grant in advance of the approval of the survey thereof in accordance with the decree of confirmation, the court below erred, and the cause must be reversed. It is so ordered."

Territory vs. Persons, 76 Pac. 316.

"Prior to the survey of lands included in a railroad grant, such lands are not subject to taxation."

State vs. Central Pacific, 21 Nev. 94.

The Supreme Court of Wisconsin, 31 Wis. 359, *Whitney vs. Gunderson,* had held that unsegregated lands might be taxed. It reconsidered the matter, however, and says:

The Act of Congress undoubtedly contemplated that a survey of the land confirmed to Grignon should be made under the direction of the Commissioner of the General Land Office. This was obviously for the purpose of fixing the locality of the tract confirmed to him and his assigns; and until the approved survey was made and a patent therefor issued, it was impossible to determine the boundaries of the tract of land to which title would attach under the grant. And this circumstance distinguishes this case from cases where the lands acquired from the United States have been previously surveyed and segregated from the mass of the public lands. In the latter case possession can be taken of some distinct sub-division which becomes private property, and therefore justly chargeable with the payment of taxes. But in the case before us, the grant was to be located by a survey made under the direction of the Commissioner of the General Land Office, and until this approved survey was made and a certificate as evidence of that fact or a patent issued, the title to no specific tract of land passed under the Act. This we think is the manifest intent of this Act and we were therefore mistaken in holding that it vested in Pierre Grignon and his assigns the equitable title and ownership of any specific tract of land before such tract had been ascertained and designated by the United States survey."

In 1889, the Supreme Court of the Territory of Arizona held that unsurveyed lands were not taxable and should be excluded from the tax list.

Territory vs. Delinquent Tax List, 3 Ariz. 117.

"The appellees' lands were not distinguishable from or segregated from the public lands until a survey and definite location of its boundaries were made under the authority and by the direction of the National Government."

Crittenden Cattle Co. vs. Ainsa, 14 Ariz. 306.

"Hence the land is not to be taxed before its survey and the approval of the survey, nor is it subject to taxation before the full payment and the acceptance of the price by the United States."

27 Cyc. 868.

"Apparently the rule is that unsurveyed lands are not taxable, and the survey is not completed until the same is accepted by the Land Department. *Central Pacific Railway Co. vs. Nevada,* 162 U. S. 512; *City vs. Central Pacific Railway Co.,* 25 Pac. 442; *Stoneroad vs. Stoneroad,* 158 U. S. 240; *United States vs. Montana Lumber Co.,* 196 U. S. 573; *Clemons vs. Gillett,* 83 Pac. 879; *Robinson vs. Forest,* 29 Cal. 325; *Territory vs. Persons,* 76 Pac. 316; *Tubbs vs. Wilholt,* 136 U. S. 134."

Clearwater Timber Co. vs. Shoshone County, 155 Fed. 612.

"The approval and certification of the lands by the Land Department is a necessary preliminary to the identification of the lands taken. Without identification, the grant cannot attach, and until it does attach there is no title that can be the subject of levy and sale for taxes or otherwise."

Altshul vs. Gillings, 102 Fed. 36.

"Until a Spanish grant has been segregated from the public domain by a survey, properly approved, it is not subject to taxation by a state authority, and a sale therof for such taxes is void."

Robertson vs. Sewell, 87 Fed. 536, C. C. A., Fifth Circuit.

"For the purpose of taxation, it should be held that lands are surveyed when they are identified; that is to say, when the survey thereof is finally approved. The grant to the railroad company was a grant *in praesenti*, but title did not vest in any particular tract of land until the same was identified by a government survey. So far as the decisions have gone, the survey and the approval of the survey have been uniformly recognized as the conditions precedent to the vesting of title so as to render lands subject to taxation." 37 Cyc., 868; *Clearwater Timber Co. vs. Shoshone County*, (C. C.), 155 Fed. 612; *Robertson vs. Sewell*, 87 Fed. 536, 31 C. C. A. 107; *Bird Timber Co. vs. Snohomish County*, 81 Wash. 416, 143 Pac. 433;

Upshur vs. Pace, 15 Tex. 531. Said the court in *Wisconsin Railroad Co. vs. Price County,* 133 U. S. 496, 505, 10 Sup. Ct. 341, 344 (33 L. Ed. 687)."

And Judge Ross adds:

"* * * the survey of the public lands therein described was not a completed act until the approved plat thereof was filed in the local land office, and that, as the government survey of the lands was not a completed act at the time of the levy of the assessment, the lands involved in the third count were not then segregated from the public domain, which segregation I understand to be essential to any authority of the state to tax them. *Northern Pacific Ry. Co. vs. Trail County,* 115 U S. 600, 6 Sup. Ct. 201, 29 L. Ed. 477."

Northern Pacific Ry. Co. vs. Thompson, 253 Fed. 178, C. C. A., Ninth Circuit.

"While, as above stated, it does not clearly appear from the opinion of the Supreme Court of Nevada in this particular case what the distinction is as to a possessory claim between surveyed and unsurveyed lands, there is a clear distinction in the fact that until lands are surveyed it is impracticable to identify them for the purpose of taxation."

Central Pacific Ry. vs. Nevada, 162 U. S. 512.

In the recent case of *Wilson Cyprus Company vs. Del Poso,* 236 U. S. 635, it was decided that land em-

braced by a Spanish Grant reported as valid by Land Commissioners, and confirmed by Act of Congress of May 23, 1828, to the extent of one square league, was segregated from the public domain, and subject to state taxes, on the making, in 1851, of the survey, said survey being made the foundation of the patent subsequently issued. The Court states that the grant, having been found valid in 1828, and granted by that Act, and the land having been actually surveyed and segregated in 1851, that then all of the conditions necessary to taxation were complied with.

Such cases as the Maish case, 164 U. S. 599, are clearly distinguishable from the case here. In that case, the delinquent tax list was, by statute, made prima facie evidence that the taxes described in the list were due against the property. There was no evidence that the Mexican grant involved in the case had not been surveyed or segregated from the public domain, and there was no evidence that the grant was not a perfect grant, with boundaries as certain and definite as those given by patent of a similar tract from the United States. The only matter of defense as to the character of the lands was that certain tracts of lands in the list were Mexican land grants, and that they had not been confirmed. Upon this state of facts, the Court, speaking by Mr. Justice Brewer, says:

> "It must be borne in mind, that in the record before us these land grants are not otherwise described than as Mexican land grants. For aught

that appears, they may have been 'perfect grants,' as they are sometimes called; that is, grants absolute and unconditional in form, specific in description of the land, passing a title from the Mexican government to the grantee as certain, definite and unconditional as a patent to a similar tract from the United States; and not 'imperfect grants'; that is, grants of so many acres or leagues of land within large exterior boundaries and based upon conditions precedent, and creating only an inchoate though equitable title to some as yet undefined and unsegregated tract. * * * within the reasoning and these decisions, as it does not appear that these lands were not held by perfect grants under the laws of Mexico, or that they were not in the possession of the appellants and covered with valuable improvements, it must be held that the objection to their taxation cannot be sustained."

In the present case it does appear affirmatively, and is not controverted, that the lands had never been surveyed, that title had never been affixed to any particular or specific tract, nor in any manner segregated from the public domain, and that the plaintiffs in error had never been in possession.

As these lands were not segregated from the public domain, they were, of necessity, still part of it.

"It is a familiar law that a state has no power

to tax the property of the United States within its limits. This exemption of their property from said state taxation—and by state taxation we mean any taxation by authority of the state, whether it be strictly for state purposes or for mere local and special objects—is founded upon that principle which inheres in every independent government, that it must be free from any such intereference of any other government as may tend to destroy its powers or impair their efficiency."

Wisconsin R'd Co. vs. Price Co., 133 U. S. 503.

This case in many respects resembles the case here. It was a question of taxation, and whether the State of Wisconsin had the authority to tax land claimed to be still a part of the public domain. The general principles controlling are stated by the Court (citing page 505), and are, that usually the possession of the legal title by the government determines both the fact and right of ownership; but with the exception, that where Congress has prescribed conditions, and provided that upon the performance of the conditions patnt shall issue, *the land alienated being distinctly defined, and the grantee not being excluded from the possession of the property,* and there being nothing further to be done, except the issuance of the patent, then the purchaser will be treated as the beneficial owner, and the land will be subject to taxation. It must follow, that where the land has never been definned, where the government refuses to define it by filing or approving the

survey, where the government has cancelled and attempted to annul the grant, and is issuing patents to others who are in possession, where the grantees under the Congressional Act are not in possession, and are in effect excluded from possession, the exception can have no application, the general rule must prevail, and the land be regarded as public domain.

The Enabling Act, approved June 20, 1910, under which Arizona was admitted as a State, provides:

> "That no taxes shall be imposed by the State upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use."
>
> Paragraph Second, Sec. 20.

The Act admitting California to the Union contained a similar provision (as do nearly all, if not all, of the statehood acts), and it was there held, in *Central Pacific R. R. Co. vs. Howard,* 52 Cal. 227, that under this provision no parcel of the public lands could be taxed until a patent had issued to a private person, or until such private person had become vested with a perfect equity, without anything more to be paid, or any act to be done, going to the foundation of his right, and the case of *Railway vs. Prescott,* 16 Wall. 608, was cited in support.

There could be no equity in any particular lands until the specific lands were segregated from the great body of the public domain, and a survey, necessary to segre-

gation, would be somthing yet to be done, going to the foundation of a private right.

We submit, therefore, that neither the Territory nor the State of Arizona had any right to tax any of the property involved in this grant prior to December, 1914, and that the attempted levy and assessment of taxes for the years 1910, 1911 and 1912 were utterly void.

The trial court inclined to this view, as stated in its memorandum opinion (Tr. p. 220), but felt bound by the decision of the Supreme Court of Arizona in *State vs. Watts,* 21 Arizona 93, 185 Pac. 934. We cannot conceive that the decision of a State Court can control the Federal Courts in determining the question as to whether or not lands which have not been segregated from the public domain of the United States may be taxed by a state. If it be conceded, for the sake of argument, that such a decision is controlling, then we point out that the trial court overlooked the fact that in that case the assessments were made to the true owners, the property sufficiently described, and that the tax was held to be not upon the land itself but upon the claim which the claimants made thereto, which claim afterwards ripened into full title upon segregation being made from the public domain.

We have heretofore pointed out that the Arizona Supreme Court, in holding that such a "claim" is taxable prior to the segregation of the land, is contrary to the previous decisions of that court and is in conflict

with the decisions of the courts of other states and of the Supreme Court of the United States.

Here the assessment was made to a corporation which had no legal interest in Baca Location No. 3. The tracts of land attempted to be assessed were not described in such manner that the true owners could know that their property was being assessed. The owners of Baca Location No. 3, granted by Act of Congress, owned no mining claims, and assessment of mining locations constituted no notice to them that their property was being assessed, nor did the complaint in the suit to foreclose a lien upon such locations give any notice. If A is the owner of a tract of land in fee simple upon which B, under a mistaken idea of otherwise, attempts a mining location under the laws of the United States relating to such locations on the public mineral lands, what possible notice would the public records of tax proceedings against such mining claims convey to B that his own property was being assessed?

It is, of course, conceded by defendant in error that it obtained no title whatever by reason of the attempted mining locations. They were void; the land upon which they were located was not unappropriated public mineral lands upon which mineral locations could be made.

The assessment for taxes purported to be upon mining locations as such. The territory and state taxed something which in law did not exist. The

judgment attempted to foreclose a lien which did not in law exist, and the sheriff attempted to sell something which had no legal existence. If the decision in *State vs. Watts, supra,* be accepted that "claims" to such property may be taxed and sold for taxees, then certainly the purchaser at such a tax sale gets nothing but the "claim." If that claim ever ripens into title, the purchaser gets something, but if that claim does not ripen into title, the purchaser gets nothing. So in this case if the taxes were properly levied as upon a "claim" to land, which "claim" is of the nature of a mineral location, and such mineral location proves invalid, there could seem to be no doubt that the claim is worthless. The purchaser at the tax sale got no more than the taxpayer had, the State could not take from the taxpayer for the paymnt of taxes something which he did not have. If the taxpayer had nothing the state got nothing and the purchaser at the sale got nothing.

If the "claim" to the lands involved in *State vs. Watts* had been held invalid, it could not be contended that the lien for taxes attached to the land and was enforceable in the hands of some other person to whom the United States might have conveyed it.

THE JUDGMENT IN THE TAX PROCCEDINGS MAY BE COLLATERALLY ATTACKED IN THIS ACTION.

We believe we have heretofore shown that Baca Location No. 3, nor any of the lands embraced therein,

did not become taxable by the Territory or State of Arizona until segregated from the public domain on December 14th, 1914. Defendants in error, however, contend that the fact that the property was not subject to taxation is immaterial, because there was a proper judgment of the Superior Court of Santa Cruz County, Arizona, foreclosing the lien for taxes, and that the validity of that judgment cannot be collaterally attacked.

The general rule is that the judgment of a court having jurisdiction of the person and of the subject matter and jurisdiction to render the particular judgment which it did render is conclusive against collateral attack. If the judgment in question does not satisfy these three requirements, and each and all of them, it is void, a mere nullity, and can be collaterally attacked in this action of ejectment.

Unless it be held, as was held by the Supreme Court of Arizona, that the "claim" to the land embraced in the attempted mining locations only was assessed and that "claim" was the subject matter of the action to foreclose the lien, then the only other subject matter was the land itself, which was ordered sold for delinquent taxes. It was the *res.* No personal judgment was authorized by the statute.

Territory vs. Copper Queen Company, 13 Arizona 198.

The state had no power to tax the land, no power to

sell it for taxes and no power to affect it in any way whatsoever, and its action in assessing these taxes and ordering the lands sold, if that is the effect of the judgment, was beyond its jurisdiction and void. It would hardly be contended under our laws that the court of one county would have jurisdiction to render a judgment foreclosing a tax lien on land in another county. Such a judgment would be void as utterly beyond its jurisdiction. This is an exactly analogous case. Baca Location No. 3 was just as much outside the jurisdiction of the court of Santa Cruz County on the question of the enforcement of a tax lien as if it had been located in some other county or state.

One of the essentials of a valid judgment is that the court pronouncing it must have jurisdiction to render that particular judgment.

Windsor vs. McVeigh, 93 U. S. 274; *United States vs. Walker,* 109 U. S. 258; *Ritchie vs. Sayers,* 100 Fed. 520; *Russell vs. Shurtleff*, 28 Col. 414, 65 Pac. 27.

In *Willcox vs. Jackson,* 13 Peters 498, under an Act of Congress the Register and Receiver of a land office decided that an applicant for certain land who was then in possession was entitled to preempt the same, and issued their certificate and final receipt. This decision of the Register and Receiver was not appealed to the General Land Office. The suit was in ejectment, brought by the claimant against certain officers of the United States. The State Court of Illinois, in which

the action was brought, decided in favor of the defendant. The Supreme Court of Illinois reversed the judgment, deciding in favor of the plaintiff. The case then went to the Supreme Court of the United States by writ of error.

It was claimed by the defendant that the land had been withdrawn from entry by the President. It was urged by the plaintiff, however, that under the terms of the Act of Congress, the Register and Receiver of the Land Office acted judicially in determining that the claimant was entitled to the land. This view was accepted by the Supreme Court, which disposes of the question as follows:

> "Before we proceed to inquire whether the land in question falls within the scope of any one of these prohibitions, it is necessary to examine a preliminary objection which was urged at the bar, which, if sustainable, would render that inquiry wholly unavailing. It is this—that the Acts of Congress have given to the Registers and Receivers of the land offices the power of deciding upon claims to the right of preemption — that upon these questions they act judicially—that no appeal having been given from their decision, it follows as a consequence that it is conclusive and irreversible. This proposition is true in relation to every tribunal acting judicially, whilst acting within the sphere of their jurisdiction, where no appellate tribunal is created; and even when there

is such an appellate power, the judgment is conclusive when it comes collaterally into question, so long as it is unreversed. But directly the reverse of this is true in relation to the judgment of any Court acting beyond the pale of its authority. The principle upon this subject is concisely and accurately stated by this Court in the case of *Elliott et al. vs. Peirsol et al.,* 1 Peters 340, in these words:

" 'Where a Court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other Court. But if it act without authority, its judgment and orders are regarded as nullities. They are not voidable, but simply void.'

"Now to apply this. Even assuming that the decision of the Register and Receiver, in the absence of fraud, would be conclusive as to the facts of the appellant then being in possession, and his cultivation during the preceding year, because these questions are directly submitted to them; yet if they undertake to grant preemptions in land in which the law declares they shall not be granted, then they are acting upon a subject matter clearly not within their jurisdiction; as much so as if a Court, whose jurisdiction was declared not to extend beyond a given sum, should attempt to take cognizance of a case beyond that sum."

Attention is also called to *Gibson vs. Chouteau,* 13 Wallace 92, and *Jourdan vs. Barrett,* 4 Howard 169.

THE DEED OF THE SHERIFF OF SANTA CRUZ COUNTY CONVEYED NOTHING.

The so-called mining locations had no legal existence. They were as if they never existed. Could the court, by adjudging that taxes were legally levied upon them, breathe into them the breath of life and constitute them something which the law had not theretofore recognized? What the sheriff was ordered to and did attempt to sell was "all the right, title and interest of Consolidated Mining, Smelter & Transportation Company in and to" certain mining locations, describing them by name and the book and page where their location notices were recorded in the office of the County Recorder. We repeat that if no such things existed in law before the tax was assessed, the judgment of the court that the tax was due and the order for the sale of the mining locations gave them no more validity than they had before.

The mining claims are described as patented mines. As a matter of fact, no patents are in existence. It is recited in the execution that "application for United States patents has been made upon each and all of the hereinbefore described mines and mining claims and final receipt has issued, but the patents have as yet not been issued." (Tr. pp. 144-115.) The laws of the United States require that one hundred dollars worth

of work or improvements be done upon each mining location each year. If such work is not done a mining claim is open to forfeiture. The purchaser bought only such rights as the locator had. If the effect of the judgment under consideration is that the locations were valid mining claims and the purchaser got them as such, the question is suggested whether he should continue to do assessment work upon them, and if he does not, who may take advantage of the failure.

In view of this branch of the case, it would seem that as to at least eight of the so-called mining claims the sheriff's sale was void. All but eight of the claims were separately sold and the return recites:

> "that after selling the above I continued to offer the said property in parcels until I had offered the whole thereof, and did receive no bid for the same; that thereupon I offered all of the remainder of said property not sold as aforesaid, to-wit:"

the eight remaining claims, described them by name, and which were sold in one lot. (Tr. pp. 140-141.)

The statute under which the suit was brought and prosecuted and the attempted sale made is Act Number 92 of the Laws of 1903, Session Laws of Arizona, 1903, page 162. This statute was adopted from the laws of Missouri. In *Territory vs Copper Queen,* 13 Arizona 198, reading page 215, it is said, in speaking of this statute:

> "This statute was adopted from Missouri, and a

prior construction thereof by the courts of last resort of the State of Missouri is, under well established principles, controlling upon us."

Such an action is one

"*Quasi in rem* to fix a lien upon specific property. No personal judgment can be had."

Territory vs. Copper Queen, supra.

In *Rosenblatt vs. Sargeant,* 76 Missouri 557, the sheriff had an execution for taxes against ten lots. The taxes all aggregated $687.33. The sheriff sold them separately and the first three lots sold brought more than enough to pay the taxes on all. The sheriff, however, proceeded to sell all the lots and it was contended that the sheriff should not have sold any of the lots after he had realized sufficient to pay the total amount of the judgment. The supreme Court of Missouri, however, said:

"The State has no lien upon one lot for the taxes charged against another lot, although both lots are owned by the same person; and the decree in the case before us directs, in substance, that each lot, or so much thereof as may be necessary, shall be sold for its own taxes, interest and costs. The judgment and execution cannot be otherwise construed without making them inconsistent with themselves, and in conflict with the statute. How can the decree, that a certain sum shall be levied of each lot, be enforced if the command of the execu-

tion, 'that of the property above described, or so much thereof as may be necessary, you cause to be made the judgment, interest and costs aforesaid,' be construed to mean that the sheriff should sell only as many of the lots as should be necssary to realize a sum sufficient to pay the taxes on all the lots? The only rational construction of the language quoted is that the sheriff should sell only so much of each of the several lots describd in the judgment and execution, as might be necessary to pay the taxes, interest and costs adjudged severally against the same.

"No complaint is made that the several lots should have been subdivided, and none could well be made, as each lot had only a frontage of twenty feet. Nor could the sheriff have sold all the lots in one body. This would have been in contravention of the decree, and of the rule that each lot must be sold for its own taxes. Cooley on Taxation, p. 432, and cases cited.

"It must be remembered that the Revenue Act of 1877, under which this suit was brought, provides for no personal judgment against the owners, but only for a judgment enforcing the tax lien against the land. Of the constitutionality of such a provision we have no question.

"When the claim for taxes is merged in a judgment, all right or power of distraint under the

statute is gone; the sheriff cannot then exercise it, nor can the court set aside its own decree and substitute therefor another mode of collecting the tax sued for. If the judgment was a personal one against the owner, the power of the sheriff over the proceeds of the sale of a lot, in excess of the tax due on the same, would perhaps be different. That one of several lots separately assessed and belonging to the same owner cannot be sold to pay the taxes due on all, has been expressly decided, under a statute similar to ours, in the case of *Hayden vs. Foster,* 13 Pick. 492, the opinion in which case was delivered by Chief Justice Shaw."

THE INTEREST OF THE PLAINTIFFS, DAVID W. BOULDIN AND HELEN LEE BOULDIN, COULD IN NO WISE HAVE BEEN AFFECTED BY THE JUDGMENT AND SALE IN THE TAX PROCEEDINGS, BECAUSE THEY WERE NOT PARTIES TO THAT ACTION.

Daisy Belle Bouldin, mother of David W. Bouldin and Helen Lee Bouldin, died in 1907. At the time of her death she was the owner of a half interest in the north half of Baca Location No. 3, and at her death her interest descended to David W. Bouldin and Helen Lee Bouldin, her only children and her heirs at law. The proceedings for the collection of these delinquent taxes was begun in 1913, and Daisy Belle Bouldin was made a party defendant to that action. She had been

dead five years and her interest had descended to her children.

Under the great weight of authority the proceedings in the tax case could not affect the one-half interest which was owned by Daisy Belle Bouldin in her life-time, but which was owned by her children at the time the taxes were levied, and suit brought, since they were not parties to the suit.

Allen vs. Ray, 86 Mo. 542, 10 S. W. 153; *Williams vs. Hudson,* 6 S. W. 261; *Kohlman vs. Glaudi,* 52 La An. 700, 27 So. 116; *Millaudon vs. Gallagher,* 104 La. 713, 29 So. 307; *Boagni vs. Pac. Imp. Co.* 111 La. 1063, 36 So 129; *Morrill vs. Lovett,* 95 Maine 165, 49 Atl. 666.

We submit that the judgment of the trial court is erroneous and that it should be reversed and judgment ordered entered in this court for plaintiffs in error.

SAMUEL J. KINGAN,
JOHN H. CAMPBELL,
ARCHIE R. CONNOR,
Attorneys for Plaintiffs in Error.

No. 4209

United States

Circuit Court of Appeals

For the Ninth Circuit.

JAMES E. BOULDIN, DAVID W. BOULDIN, HELEN L. BOULDIN (Now BRANSFORD), and WELDON M. BAILEY,

Plaintiffs in Error,

vs.

ALTO MINES COMPANY, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Arizona.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4209

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

SAMUEL L. KINGAN, Esquire, Tucson, Arizona,
JOHN H. CAMPBELL, Esquire, Tucson, Arizona,
A. R. CONNER, Esquire, Tucson, Arizona,
For Plaintiffs in Error.

BEN C. HILL, Esquire, Tucson, Arizona,
For Defendants in Error.

In the District Court of the United States in and for the District of Arizona.

AT LAW—No. 107 (Tucson).

JAMES E. BOULDIN, DAVID W. BOULDIN, HELEN L. BOULDIN and WELDON M. BAILEY,

Plaintiffs,

vs.

THE ALTO MINES COMPANY, a Corporation Organized Under the Laws of the State of Arizona, THE ALTO COPPER COMPANY, a Corporation Organized Under the Laws of the State of Maine, THE SANTA CRUZ MINES AND SMELTER COMPANY, a Corporation Organized Under the Laws of the State of Arizona, THE CONSOLIDATED MINES, SMELTER AND TRANSPORTATION COMPANY, a Corporation Organized Under the Laws of the State of Delaware, ALBERT STEINFELD, HENRY F. GUERIN, JOHN DOE, RICH-

ARD ROE, HENRY ROE, JAMES DOE, RICHARD ROE, ARTHUR DOE and ARTHUR ROE,

Defendants.

Amended Complaint.

To the Judge of the District Court of the United States in and for the District of Arizona:

James E. Bouldin, David W. Bouldin, Helen L. Bouldin and Weldon M. Bailey, citizens of the State of Texas, bring this their amended complaint against The Alto Mines Company, a corporation organized under the laws of the State of Arizona, The Alto Copper Company, a corporation organized under the laws of the State of Maine, The Santa Cruz Mines and Smelter Company, a corporation organized under the laws of the State of Arizona, The Consolidated Mines, Smelter and Transportation Company, a corporation organized under the laws of the State of Delaware, Albert Steinfeld, Henry F. Guerin, John Doe, Richard Roe, Henry Doe, Henry Roe, James Doe, James Roe, Arthur Doe and Arthur Roe, citizens of the State of Arizona, and for a cause of action allege: [1*]

I.

That the true names of the defendants sued as John Doe, Richard Roe, Henry Doe, Henry Roe, James Doe, James Roe, Arthur Doe and Arthur Roe are unknown to plaintiffs, and plaintiffs beg leave that as soon as they have ascertained the true

*Page-number appearing at foot of page of original certified Transcript of Record.

names of said defendants they may be permitted to insert the same herein.

II.

That plaintiffs are the owners in fee simple of the whole of the north half of a certain tract of land, known as Baca Float No. 3, situated in the County of Santa Cruz, State of Arizona, said tract of land being more particularly described as follows:

> Commencing at a point one mile and a half from the base of the Salero Mountain in a direction north forty-five degrees east of the highest point of said mountin; running thence from said beginning point west twelve miles, thirty-six chains and forty-four links; thence south twelve miles, thirty-six chaind and forty-four links; thence east twelve miles, thirty-six chains and forty-four links; and thence north twelve miles, thirty-six chains and forty-four links to the place of beginning, according to the official survey of said tract of land made under the direction of the Surveyor-General of Arizona in 1906.

That said land was surveyed under the direction of the Surveyor-General of Arizona, 1906, and on or about December 14, 1914, under the mandate of the Supreme Court of the United States, the map and plat of the said survey of the said land was approved and filed in the office of the Commissioner of the General Land Office, at Washington, D. C., for the purpose of defining the outboundaries of said land and segregating the same from

the public domain, and as a muniment of the plaintiffs' title. That said land was not segregated from the public domain of the United States until on or about the 14th day of December, 1914. Plaintiffs' ownership of the north half of Baca Float No. 3 is single, separate and distinct, and held by one title, deraigned from the Government of the United States. [2]

III.

That the plaintiffs are entitled to the possession of the whole of the north half of said tract, and to each and every part thereof, and that plaintiffs are informed and believe and aver that the said defendants and each and all of them make claim to some part of the land within the boundaries of the said north half of the above-described Baca Float No. 3, the particular lands claimed by said defendants and the description thereof being unknown to plaintiffs.

IV.

That the defendants are now unlawfully keeping the plaintiffs out of the possession and withholding from the plaintiffs the possession of parts of the last above-described premises, to wit, the north half of the said Baca Float No. 3, as hereinbefore described.

V.

That the plaintiffs have been damaged in a large sum, to wit, the sum of fifty thousand dollars ($50,000) by the action of said defendants in so withholding possession of the above-described premises from them.

VI.

That the value of the land and matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000).

WHEREFORE, plaintiffs pray judgment against the defendants that they deliver up to them the possession of the above-described premises and make no further claim to the ownership thereof or the right of possession thereto, and for damages in the sum of $50,000 for withholding the same, together with their costs in this behalf expended and for all other further and proper relief.

JOSEPH W. BAILEY,
JOHN H. CAMPBELL,
Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 31, 1918, at —— M. Mose Drachman, Clerk. By Effie D. Botts, Deputy Clerk. [3]

United States District Court, District of Arizona.
AT LAW—No. 107 (Tucson).

JAMES E. BOULDIN et al.,
Plaintiffs,

vs.

ALTO MINES COMPANY et al.,
Defendants.

Amended Answer to Amended Complaint.

The defendant, Alto Mines Company, by G. H. Brevillier, its attorney, files the following amended answer to the amended complaint herein:

First. Answering the paragraph or section of the amended complaint marked "II," it denies upon information and belief each and every allegation therein contained, except that it admits that the land was surveyed under the direction of the Surveyor-General of Arizona in the year 1906, and the plat of survey filed or re-filed under the direction of said mandate. It further alleges upon information and belief that said survey was received, found correct and approved in the year 1906 by the Commissioner of the General Land Office.

Second. Answering the paragraph or section of the amended complaint marked "III," it denies upon information and belief that the plaintiffs or any of them are entitled to the possession of the whole or any part of said land.

Third. Answering the paragraph or section of the amended complaint marked "IV," it denies upon information and belief each and every allegation therein contained except that it admits and alleges that it is now the lawful owner in fee simple, and entitled to the possession of [4] so much of the north one-half of said Baca Float No. 3 as is hereinafter specifically described in the first separate defense herein.

Fourth. Answering the paragraph or section of the amended complaint marked "V," it denies upon information and belief each and every allegation therein contained.

FOR A FIRST SEPARATE DEFENSE THIS DEFENDANT ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

Fifth. The defendant reiterates the allegations and denials contained in the first four paragraphs of this amended answer, being those first appearing herein with the number "First," "Second," "Third," and "Fourth."

Sixth. That it was at the time of the commencement of this action and still is the sole and lawful owner in fee simple, and in possession and lawfully entitled to possession of all those certain pieces or parcels of the demanded premises being:

ALL those certain mines, mining claims, mining properties and the land covered thereby, with the appurtenances, situate, lying and being in the Tyndall Mining District, County of Santa Cruz, State of Arizona, as follows, to wit:

OPHIR No. 2, the location notice of which is recorded in Book 5 of Mining Locations at page 189;

OPHIR No. 1, the location notice of which is recorded in Book 5 of Mining Locations at page 188;

EXCELSIOR, the location notice of which is recorded in Book 1 of Mining Locations, at page 85;

EXCELSIOR WEST, the location notice of which is recorded in Book 1 of Mining Locations, at page 93;

BUENA VISTA, the location notice of which is recorded in Book 1 of Mining Locations, at page 86;

HILLSIDE, the location notice of which is recorded in Book 2 of Mining Locations, at page 160;

DONAU, the location notice of which is recorded in Book 1 of Mining Locations, at page 88;

GREAT EASTERN, the location notice of which is recorded in Book 2 of Mining Locations, at page 162;

GRAND PRIZE, the location notice of which is recorded in Book 1 of Mining Locations, at page 84;

ALTO EAST, the location notice of which is recorded in Book 1 of Mining Locations, at page 82. [5]

Also all that part and parcel of the STEINFELD WEST, ALBERT, STEINFELD, ALTO, ALBIAN and RECORD, which lies south of the north boundary of Baca Float No. 3, as selected on June 17th, 1863, under and pursuant to an act of Congress approved June 21st, 1860, as said line is now fixed and established by the survey of Phillip Contzen, Deputy Mineral Surveyor, made in the year 1905.

The location notices of said respective claims last mentioned, are recorded as follows: STEINFELD WEST, the location notice of which is recorded in Book 1 of Mining Locations, at page 80; ALBERT, the location notice of which is recorded in Book 1 of Mining Locations, at page 58; STEINFELD, the location notice of which is recorded in Book 1 of

Mining Locations at page 56; ALTO, the location notice of which is recorded in Book 1 of Mining Locations, at page 81; ALBIAN, the location notice of which is recorded in Book 1 of Mining Locations, at page 54, and the RECORD, the location notice of which is recorded in Book 5 of Mining Locations, at page 191.

The book and page references hereinabove made, are to the books of the County Recorder's office of Santa Cruz County.

Seventh. That it acquired its title thereto in fee simple absolute by various deeds, among them being a deed made by William S. McKnight as sheriff of Santa Cruz County, State of Arizona (said William S. McKnight being then and there such sheriff) to this defendant, dated and delivered February 5, 1916, under and in pursuance of the sale duly and lawfully made by said sheriff under a certain final judgment or decree, duly given, made and entered in and by the Superior Court of the county of Santa Cruz, State of Arizona, on December 5, 1913, and being Cause No. 155 in said court, in which action the State of Arizona, at the relation and to the use of Raymond R. Earhart, treasurer and *ex-officio* tax collector in and for the county of Santa Cruz, State of Arizona, was plaintiff and the plaintiffs herein and their predecessors in title and others were defendants. That said judgment or decree was duly given, made and rendered by said court, and is now and has been at all times since it was given, made and rendered, in full [6] force and

effect, and that said Court then and there had due and lawful jurisdiction to render the same; that said judgment or decree directed the premises so conveyed by said sheriff to be sold at public auction; and that said premises were lawfully so sold at public auction by said sheriff and purchased thereat by Samuel F. Noon for this defendant, and the consideration therefor paid by this defendant to said sheriff by him. That said sheriff thereupon made and issued the usual certificate in duplicate of said sale in due form of law as required by the laws of the State of Arizona, and delivered one thereof to said Samuel F. Noon, and caused the other to be filed in the office of the County Recorder of Santa Cruz County. That said sale was made under said judgment as aforesaid on June 29, 1914; that no redemption (if any right thereto existed) was ever made of the premises so sold as aforesaid by or in behalf of the plaintiffs herein or any of them, or by or on behalf of any other person whatsoever. That by deed dated June 29, 1914, and recorded in the office of the Recorder of Santa Cruz County aforesaid on January 8, 1915, in Book 6 M.D., pages 120 to 122, the said Samuel F. Noon and Natalie F. Noon, his wife, did convey to this defendant the premises hereinbefore more particularly set forth, and did expressly authorize and direct the sheriff of Santa Cruz County aforesaid to execute and deliver a deed to this defendant therefor. That said deed made as aforesaid by said sheriff to this defendant was duly acknowledged by said sheriff on February 5, 1916, and duly recorded in the office of the re-

corder of Santa Cruz County aforesaid on February 5, 1916, in Book 6 M. D., page 258. That said judgment or decree was duly given, made and rendered on lawful service against the plaintiffs herein and [7] their ancestors in title; and that the plaintiffs herein were duly presented and represented at said sale and made no objection thereto, and permitted the said Samuel F. Noon to purchase the said premises for this defendant and pay the consideration therefor to said sheriff without making any objection or protest to said sheriff at any time or to any person whatsoever or in any way whatsoever as to said sale or said judgment or decree.

FOR A SECOND SEPARATE DEFENSE THIS DEFENDANT ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

Eighth. The defendant reiterates the allegations and denials contained in the first four paragraphs of this amended answer, being those first appearing herein with the numbers "First," "Second," "Third," and Fourth."

Ninth. That it and its predecessors in title have been in continuous, peaceable, quiet and adverse possession of said premises, under claim of title and under color of title, cultivating, using and enjoying the same and claiming under deeds duly recorded, for more than ten years prior to the commencement of this action, and for more than five years prior to the commencement of this action, and for more than three years prior to the commencement of this action, and for more than two years prior to the

commencement of this action; and that the claim of the plaintiffs herein is now and was at the time of the commencement of this action barred by each and every statute of limitation of the State of Arizona or of the former Territory of Arizona.

FOR A THIRD SEPARATE DEFENSE THIS DEFENDANT ALLEGES UPON INFORMATION AND BELIEF.

Tenth. The defendant reiterates the allegations and [8] denials contained in the first four paragraphs of this amended answer, being those first appearing herein with the numbers "First," "Second," "Third," and "Fourth."

Eleventh. That this action is brought by the plaintiffs to test the validity of the taxes and tax sale referred to in the first separate defense herein, but neither said plaintiffs nor any of them paid or offered to pay the amount of such taxes to the county treasurer of Santa Cruz County, Arizona, together with all penalties thereon as in the case of other taxes, as provided by the laws of the State of Arizona, and amongst other laws Section 4939 of the present Civil Code of the State of Arizina, and neither said plaintiffs nor any of them paid or offered to pay to the said county treasurer, or to this defendant, or to any other person, officer, official or corporation the amount of such taxes or any part thereof or of said penalties, nor the amount bid for said properties by said Samuel F. Noon at the sheriff's sale specified in the first separate defense herein; and that under the laws of the State of Arizona said plaintiffs cannot be permitted to

maintain this action or to test the validity of said taxes or tax sale.

WHEREFORE this defendant prays judgment dismissing the complaint with costs, that the plaintiffs have and take nothing by this action, and that this defendant be adjudged and decreed to be the sole and lawful owner and lawfully entitled to possession of the lands and premises particularly described in the second paragraph of the first separate defense herein.

(Signed) G. H. BREVILLIER.
G. H. BREVILLIER,
Attorney for Defendant,
Alto Mines Company, 32 Liberty Street, New York City.

[Endorsed]: Filed March 26, 1919. Mose Drachman, Clerk. By Effie D. Botts, Chief Deputy Clerk. Original. Answer of Defendant, Alto Mines Company, to Amended Complaint. [9]

UNITED STATES OF AMERICA.

District Court of the United States, District of Arizona.

JAMES E. BOULDIN, DAVID W. BOULDIN, HELEN L. BOULDIN and WELDON M. BAILEY,

Plaintiffs,

vs.

THE ALTO MINES CO. et al.,

Defendants.

Default.

In this action the defendants, The Alto Copper Company, a corporation, The Santa Cruz Mines & Smelter Co., a corporation, The Cons. Mines, Smelter & Transportation Co., a corporation, Albert Steinfeld & Henry F. Guerin, having been regularly served with process, and having failed to appear and answer the plaintiff's complaint on file herein, and the time allowed by law for answering having expired, the default of said defendants above named in the premises is hereby entered according to law.

Given under my hand and the seal of said District Court at Tucson, Arizona, this 2d day of January, A. D. 1918.

[Seal] MOSE DRACHMAN,
Clerk.
By Effie D. Botts,
Deputy Clerk.

[Endorsed]: Filed January 2, 1918. Mose Drachman, Clerk. By Effie D. Botts, Deputy Clerk. [10]

United States District Court, for the District of Arizona.

EJECTMENT—No. 107 (Tucson).

JAMES E. BOULDIN et al.,
Plaintiffs,

vs.

ALTO MINES COMPANY et al.,
Defendants.

Stipulation Re Introduction of Public Records or Recorded Deeds.

IT IS HEREBY MUTUALLY STIPULATED and agreed that on the trial of the above case, any party may introduce uncertified copies of public records or recorded deeds, vouched for by either of the undersigned or by Ben C. Hill, Esq., under and through which they claim title to the lands involved in said case or any portion thereof, with the same force and effect as if duly certified or exemplified.

Dated, New York, April 18, 1918.

JOHN H. CAMPBELL,
Attorney for Plaintiffs.
G. H. BREVILLIER,
Attorney for Defendant, Alto Mines Company.

[Endorsed]: Filed April 22d, 1918. Mose Drachman, Clerk. By Effie D. Botts, Deputy. Stipulation. [11]

November Term, 1919—Tucson Division.

In the United States District Court for the District of Arizona.

Hon. WILLIAM H. SAWTELLE, United States District Judge, Presiding.

Minute Entry of November 4th, 1919.

No. L–107 (Tucson).

JAMES E. BOULDIN et al.,
Plaintiffs,
vs.
ALTO MINES COMPANY, a Corporation,
Defendant.

Minutes of Court—November 4, 1919—Trial.

This case came on this day regularly for trial without a jury, counsel for parties having waived the hearing by jury in open court. John H. Campbell, Esquire, and Weldon M. Bailey, Esquire, appeared as counsel on behalf of the plaintiff, and G. H. Brevillier, Esquire, and Ben C. Hill, Esquire, appeared as counsel for the defendant, and thereupon the case proceeded to trial. Plaintiffs to maintain upon their part the issues herein, offered in evidence a map, which was admitted and filed marked Plaintiff's Exhibit No. 1, and thereupon the paintiffs rested their case. The defendant then offered in evidence, the following exhibits which were marked for identification:

Defendant's Exhibit No. 1, being a deed.

Defendant's Exhibit No. 2, being certified copy of judgment.

Defendant's Exhibit No. 3, being deed from Noon to Alto Mines Co.

Defendant's Exhibit No. 4, being certified copy of writ of execution.

Defendant's Exhibit No. 5, being certificate of sale.

Defendant's Exhibit No. 6, being fifteen copies of location notices.

And thereupon the defendant rested its case. The plaintiff then offered in evidence the following exhibits which were marked for identification:

Plaintiff's Exhibit No. 2, being deed from Santa Cruz Development Co. to Abbie Fowler.

Plaintiff's Exhibit No. 3, being deed from Abbie M. Fowler to Alto Mines Co. [12]

Plaintiff's Exhibit No. 4, being record of judgment.

Defendants then offered in evidence the following exhibits, which were marked for identification:

Defendant's Exhibit No. 7, being certified copy of minute entries.

Defendant's Exhibit No. 8, being certified copy of order.

Defendant's Exhibit No. 9, being certified copy of affidavit.

And thereupon defendant rested its case.

There being no further evidence to be introduced, the case was argued by counsel in part and continued until Wednesday, the 5th day of November, A. D. 1919, at two o'clock P. M.

Minute Entry of November 5th, 1919.

JAMES E. BOULDIN et al.,

Plaintiff,

vs.

ALTO MINES COMPANY, a Corporation,

Defendant.

Minutes of Court—November 5, 1919—Trial (Continued).

The trial of this case having been continued from a previous session of this Court, come now all the parties hereto and the argument was completed and the case submitted to the Court. Thereupon the Court took the same under advisement. [13]

Plaintiff's Exhibit No. 2.

THIS INDENTURE, made this 12th day of June, in the year One thousand nine hundred and thirteen (1913) BY AND BETWEEN SANTA CRUZ DEVELOPMENT COMPANY, a corporation organized and existing under the laws of the State of Arizona, party of the first part, and ABBIE M. FOWLER, party of the second part, WITNESSETH:

That the party of the first part for and in consideration of the sum of Ten ($10) Dollars, lawful money of the United States of America, and other good and valuable considerations to them paid at or before the ensealing and delivery hereof, the receipt of which is hereby acknowledged, have granted, bargained, sold, remised, released and quit-claimed, and by these presents does grant, bargain, sell, remise, release and quit-claim, unto the said party of the second part, her heirs and assigns:

All that certain tract, piece or parcel of land, situate, lying and being in Santa Cruz County, State of Arizona, on which is located or situated a group of mines or mining claims known as "ALTO GROUP OF MINES," and the dips, angles and spurs thereof, and which mines or mining claims are described as follows, to wit:

MINERAL WEST: The location certificate of which is recorded in Book 1, Mining Locations, pages 76-77; MINERAL No. 1, the location certificate of which is recorded in Book 1, Mining locations, pages 50-51; MINERAL No. 2, the loca-

tion certificate of which is recorded in Book 1, Mining locations, pages 74-75; and the amended location certificate of which is recorded in Book 5, Mining locations, page 510; OAK, the location certificate of which is recorded in Book 1, Mining locations, pages 52-53; ALBION, the location of which is recorded in Book 1, Mining locations, pages 54-55; and the amended location certificate of which is recorded in Book 5, Mining Locations, pages 192-193; RECORD, the location certificate of which is recorded in Book 2, Mining locations, page 156, *et seq.* and the [14] amended location certificate of which is recorded in Book 5, Mining Locations, pages 191-192; ALBERT, the location certificate of which is recorded in Book 1, Mining Locations, pages 58-59; ALBERT No. 2, the location certificate of which is recorded in Book 1, Mining Locations, pages 73-74; STEINFELD, the location certificate of which is recorded in Book 1, Mining Locations, pages 79-81; STEINFELD WEST, the location certificate of which is recorded in Book 1, Mining Locations, pages 56-57; ALTO, the location certificate of which is recorded in Book 1, Mining Locations, pages 81, 82; and the amended location certificate of which is recorded in Book 5, Mining Locations, pages 508; ALTO EAST, the location certificate of which is recorded in Book 1, Mining Locations, pages 82-83; GRAND PRIZE, the location certificate of which is recorded in Book 1, Mining Locations, pages 84-85; EXCELSIOR WEST, the location certificate of which is recorded in Book 1, Mining Locations, pages 93-94; EXCEL-

SIOR, the location certificate of which is recorded in Book 1, Mining Locations, pages 85-86; HILLSIDE, the location certificate of which is recorded in Book 2, Mining Locations, pages 160 *et seq.*; OPHIR No. 1, the location certificate of which is recorded in Book 2, Mining Locations, pages 158-159; and the amended location certificate of which is recorded in Book 5, Mining Locations, pages 188-189; OPHIR No. 2, the location certificate of which is recorded in Book 2, Mining Locations, pages 159-160, and the amended location certificate of which is recorded in Book 5, Mining Locations, pages 189-190; BUENA VISTA, the location certificate of which is recorded in Book 1, Mining Locations, pages 86-87; DONAU, the location certificate of which is recorded in Book 1, Mining Locations, pages 88-89; and GREAT EASTERN, the location of which is recorded in Book 2, Mining Locations, pages 162-163; the records herein referred to are the records of Santa Cruz County, Arizona.

TOGETHER with any right, title, interest or estate which the party of the first part may hereafter acquire, become entitled or vested to said premises or any part thereof.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging or anywise appertaining, and the reversion and reversions, remainder and remainders; and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever as well in

law as in equity of the party of the first part of, in or to the said premises and every part and parcel thereof with the appurtenances. [15]

TO HAVE AND TO HOLD THE SAME unto the said party of the second part, her heirs and assigns forever.

And the said party of the first part does hereby covenant to and with the party of the second part, her heirs and assigns, that said party of the first part has not made, done, committed, executed, or suffered any act or acts, thing or things whatsoever, whereby or by means whereof the above-mentioned and described premises or any part or parcel thereof, now or at any time hereafter shall or may be impeached, charged or encumbered in any manner or way whatsoever.

IN WITNESS WHEREOF the said party of the first part has caused this instrument to be duly signed and sealed in its behalf by due authority of its Board of Directors the day and year first above written.

SANTA CRUZ DEVELOPMENT COMPANY.

[Corporate Seal] By JAMES W. IRWIN,
President. [16]

State of Massachusetts,
County of Essex,—ss.

Before me, M. Francis Buckley, a notary public in and for the county and state aforesaid, on this date personally appeared James W. Vroom, president of the Santa Cruz Development Company, a corporation organized and existing under the laws

of the State of Arizona, known to me to be such person and to me known to be the president of said corporation; and acknowledged to me as such president that he executed the foregoing instrument as the free act and deed of said corporation, by him voluntarily executed and for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 9th day of July, 1913.

[Notarial Seal] M. FRANCIS BUCKLEY.

My commission expires June 4, 1920.

[Endorsed]: Original Deed. Plaintiff's Exhibit 2 marked for identification. [17]

Plaintiff's Exhibit No. 3.

THIS INDENTURE, made this 12th day of July, in the year One thousand nine hundred and thirteen (1913) BY AND BETWEEN ABBIE M. FOWLER, unmarried, party of the first part, and ALTO MINES COMPANY, a corporation organized and existing under the laws of the State of Arizona, party of the second part, WITNESSETH:

That the party of the first part for and in consideration of the sum of Ten ($10) Dollars, lawful money of the United States of America, and other good and valuable considerations to her paid at or before the ensealing and delivery hereof, the receipt of which is hereby acknowledged, has granted, sold, remised, released and quit-claimed, and by these presents does grant, bargain, sell, remise, release and quit-claim, unto the said party of the second part, its successors or assigns:

All that certain tract, piece or parcel of land, situate, lying and being in Santa Cruz County, State of Arizona, on which is located or situated a group of mines or mining claims known as "ALTO GROUP OF MINES," and the dips, angles and spurs thereof, and which mines or mining claims are described as follows, to wit:

MINERAL WEST: The location certificate of which is recorded in Book 1, Mining Locations, pages 76-77; MINERAL No. 1, the location certificate of which is recorded in Book 1, Mining locations, pages 50-51; MINERAL No. 2, the location certificate of which is recorded in Book 1, Mining locations, pages 74-75; and the amended location certificate of which is recorded in Book 5, Mining locations, page 510; OAK, the location certificate of which is recorded in Book 1, Mining locations, pages 52-53; ALBION, the location of which is recorded in Book 1, Mining locations, pages 54-55; and the amended location certificate of which is recorded in Book 5, Mining Locations, pages 192-193; RECORD, the location certificate of which is recorded in Book 2, Mining locations, page 156, *et seq.* and the [18] amended location certificate of which is recorded in Book 5, Mining Locations, pages 191-192; ALBERT, the location certificate of which is recorded in Book 1, Mining Locations, pages 58-59; ALBERT No. 2, the location certificate of which is recorded in Book 1, Mining Locations, pages 73-74; STEINFELD, the location certificate of which is recorded in Book 1, Mining Locations, pages 79-81; STEINFELD

WEST, the location certificate of which is recorded in Book 1, Mining Locations, pages 56-57; ALTO, the location certificate of which is recorded in Book 1, Mining Locations, pages 81, 82; and the amended location certificate of which is recorded in Book 5, Mining Locations, pages 508; ALTO EAST, the location certificate of which is recorded in Book 1, Mining Locations, pages 82-83; GRAND PRIZE, the location certificate of which is recorded in Book 1, Mining Locations, pages 84-85; EXCELSIOR WEST, the location certificate of which is recorded in Book 1, Mining Locations, pages 93-94; EXCELSIOR, the location certificate of which is recorded in Book 1, Mining Locations, pages 85-86; HILLSIDE, the location certificate of which is recorded in Book 2, Mining Locations, pages 160 *et seq.*; OPHIR No. 1, the location certificate of which is recorded in Book 2, Mining Locations, pages 158-159; and the amended location certificate of which is recorded in Book 5, Mining Locations, pages 188-189; OPHIR No. 2, the location certificate of which is recorded in Book 2, Mining Locations, pages 159-160, and the amended location certificate of which is recorded in Book 5, Mining Locations, pages 189-190; BUENA VISTA, the location certificate of which is recorded in Book 1, Mining Locations, pages 86-87; DONAU, the location certificate of which is recorded in Book 1, Mining Locations, pages 88-89; and GREAT EASTERN, the location of which is recorded in Book 2, Mining Locations, pages 162-163; (the records herein referred to are the records of Santa Cruz County, Arizona).

TOGETHER with any right, title, interest or estate which the party of the first part may hereafter acquire, become entitled or vested to said premises or any part thereof.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging or anywise appertaining, and the reversion and reversions, remainder and remainders; and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever as well in law as in equity of the party of the first part of, in or to the said premises and every part and parcel thereof with the appurtenances. [19]

TO HAVE AND TO HOLD THE SAME unto the said party of the second part, its successors and assigns forever.

And the said party of the first part does hereby covenant to and with the party of the second part, its successors and assigns, that said party of the first part has not made, done, committed, executed, or suffered any act or acts, thing or things whatsoever, whereby or by means whereof the above-mentioned and described premises or any part or parcel thereof, now or at any time hereafter shall or may be impeached, charged or encumbered in any manner or way whatsoever.

IN WITNESS WHEREOF the said party of the first part has signed and sealed this instrument the day and year first above written.

In the presence of

(Signed) ABBIE M. FOWLER (Seal) [20]

State, City and County of New York,—ss.

Before me, William Himmelreich, a Notary Public in and for the county aforesaid, on this day personally appeared Abbie M. Fowler, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 12th day of July, 1913.

[Notarial Seal]

WILLIAM HIMMELREICH,
Notary Public, New York County.

Notary Public, Kings Co., No. 54.

Cert. Filed in New York Co. No. 31, Reg. No. 4151.

Cert. filed in Westchester County.

Term expires March 30, 1914.

My commission expires ————.

[Endorsed]: Original Deed. Plaintiff's Exhibit 3, marked for identification. [21]

In the District Court of the United States in and for the District of Arizona.

AT LAW—No. 107 (Tucson).

JAMES E. BOULDIN, et als.,

Plaintiffs,

vs.

ALTO MINES COMPANY et als.,

Defendants.

Statement of Plaintiff's Title.

1. On June 21st, 1860, the Government of the United States granted to the heirs of Luis Maria Baca the right to select not more than five tracts of land, each containing approximately one hundred thousand acres, in the then Territory of New Mexico.

2. On June 17th, 1863, John S. Watts, as attorney for the heirs of Luis Maria Baca, selected the tract now known as Baca Location No. 3, a part of which is here in controversy, as the third of the tracts which the heirs of Luis Maria Baca were permitted to select, by the Act of June 21st, 1860.

3. On April 9th, 1864, that selection was approved by the Commissioner of the General Land Office of Washington, D. C., and a survey of the property was ordered.

4. On May 1st, 1864, the heirs of Luis Maria Baca conveyed Baca Location No. 3 to John S. Watts, by deed dated on that day and recorded in the office of the County Recorder of Pima County, Arizona, on the 25th of May, 1894; this deed was also recorded in the records of Santa Fe County, New Mexico, on May 14th, 1864.

5. On January 8th, 1870, by deed dated on that day, and recorded on May 9th, 1885, in the records of Pima County, Arizona, John S. Watts conveyed Baca Location No. 3 to Christopher E. Hawley.

6. On May 30th, 1871, by deed dated on that day, and duly recorded, the heirs of Luis Maria Baca conveyed Baca Location No. 3 to John S. Watts,

and ratified and confirmed their previous deed of May 1st, 1864. [22]

7. On May 5th, 1884, by deed dated on that day and recorded on May 9th, 1885, in the records of Pima County, Arizona, Christopher E. Hawley conveyed Baca Location No. 3 to John C. Robinson.

8. On November 19th, 1892, by deed dated on that day and recorded on the 27th of December, 1892, in the records of Pima County, Arizona, John C. Robinson conveyed the north half of Baca Location No. 3 to Powhatan W. Bouldin and James E. Bouldin.

9. On November 7th, 1894, by deed dated on that day, and recorded on the 26th of November, 1894, in the records of Pima County, Arizona, Powhatan W. Bouldin conveyed to M. A. Taylor all of his right, title and interest in and to the north half of Baca Location No. 3.

10. On April 25th, 1895, by deed dated on that day, and recorded on the 30th of April, 1895, in the records of Pima County, Arizona, James E. Bouldin conveyed all of his interest in the north half of Baca Location No. 3 to M. A. Taylor.

11. On the 28th of November, 1896, by deed dated on that day and recorded on the 22d day of December, 1896, in the records of Pima County, Arizona, M. A. Taylor, conveyed the north half of Baca Location No. 3 to Daisy Belle Bouldin.

12. On April 16th, 1900, by deed dated on that day and recorded on the 26th of June, 1907, in the records of Santa Cruz County, Arizona, Daisy Belle Bouldin and James E. Bouldin conveyed an un-

divided one-half of the north half of Baca Location No. 3 to D. B. Gracy.

13. On June 15, 1904, by deed dated on that day, and recorded on the 26th of June, 1907, in the records of Santa Cruz County, Arizona, D. B. Gracy conveyed an undivided one-half of the north half of Baca Location No. 3 to James E. Bouldin.

14. Daisy Belle Bouldin died intestate in the year 1908, leaving surviving her two children, David W. Bouldin and Helen L. Bouldin; her interest in the north half of Baca Location No. 3 passed by inheritance to David W. and Helen L. Bouldin, subject to any question of community. [23]

16. In April, 1915, Jennie N. Bouldin and James E. Bouldin, conveyed to Weldon M. Bailey an undivided one-half of one-half of the north half of Baca Location No. 3 by a deed dated April 2d, 1915, and duly recorded in the records of Santa Cruz County, Arizona.

17. In April, 1915, David W. Bouldin and Helen L. Bouldin by separate deeds, conveyed to Weldon M. Bailey an undivided one-third of one-half of the north half of Baca Location No. 3; said deed was duly recorded in the records of Santa Cruz County, Arizona.

We, as attorneys for the plaintiffs, and for the Alto Mines Company, do hereby agree that the above is a true statement of the title of the plaintiffs in this cause, and that the same may be offered in evidence as proof of the plaintiffs' title without the necessity of offering the original or

copies of the instruments set out in the above statement.

WELDON M. BAILEY,
Attorney for Plaintiffs.
G. H. BREVILLIER,
Attorney for Defendants.

[Endorsed]: Filed Nov. 4/19. Mose Drachman, Clerk. [24]

Plaintiff's Exhibit No. 4.

In the Superior Court, County of Santa Cruz, State of Arizona. Petition.

RAYMOND R. EARHART, Treasurer and *Ex-Officio* Tax Collector in and for the County of ———— in the State of Arizona,
Plaintiff,

vs.

ALBERT STEINFELD and HENRY F. GUERIN, Receivers,
Defendants.

RAYMOND R. EARHART, Treasurer, and *Ex-Officio* Tax Collector in and for the County of Santa Cruz in the State of Arizona,
Plaintiff,

vs.

THE ALTO COPPER COMPANY, a Corporation, The Santa Cruz Mines & Smelter Company, a Corporation, the Consolidated Mines, Smelter & Transportation Company, a Corporation,

Alexander I. McLeod, L. J. Williams and Wilbur L. Davis, Constituting the Bondholders' Committee of the Said The Alto Copper Company and of the Said The Santa Cruz Mines & Smelter Company; The Santa Rita Company, a Corporation Organized Under the Laws of the State of New York, Arizona Copper Estate, a Corporation Organized Under the Laws of Arizona, James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisy Belle Bouldin, James E. Bouldin, Jane Doe Bouldin, J. E. Wise and Lucia Wise, His Wife,

Defendants.

PETITION.

1. The State of Arizona who sues in this behalf, at the relation and to the use of Raymond R. Earhart, Treasurer and *Ex-Officio* Tax Collector within and for the said County of Santa Cruz, in the State of Arizona, for cause of action states that he as aforesaid, is the duly elected, commissioned and qualified Treasurer and *Ex-Officio* Tax Collector in and for the County and State aforesaid, and is now engaged in the discharge of his duties as such, under and by virtue of the laws of said state.

2. Plaintiff further alleges that the defendants herein are the owners of the following described tracts of land situated in the County of Santa Cruz, and state of Arizona, to wit:

Tract No. 1. The following patented mining claims situate in the Tyndall Mining District of Santa Cruz County, State of Arizona, and known as the "Alto" Group of patented mines: "Mineral West," "Albert," "Albert No. 2," "Oak," "Ophir No. 1," "Excelsior West," "Excelsior," "Hillside," "Buena Vista," "Donau," "Great Eastern," "Record," "Albian," "Steinfeld," "Steinfeld West," "Alto," "Alto East," "Grans Prize," "Ophir No. 2," "Mineral No. 1," and "Mineral No. 2"; [25]

	Book M. L.	Page
Mineral West	1	76
Albert	1	58
Albert No. 2	1	73
Oak	1	52
Ophir No. 1	5	188
Ophir No. 2	5	189
Excelsior West	1	93
Excelsior	1	85
Hillside	2	160
Buena Vista	1	86
Donau	1	88
Great Eastern	2	162
Record	5	191
Albion	1	54
Steinfeld	1	56
Steinfeld West	1	80
Alto	1	81
Alto East	1	82
Grand Prize	1	84
Mineral No. 1	1	50
Mineral No. 2	1	74

The foregoing de
scriptions should b
construed as follows
Book and Page o
Mining Location, o
the records of Sant
Cruz County, Stat
of Arizona.

That all of the above described tracts of land were, for each of the years and for the several purposes, and to the amounts hereinafter set forth, subject to taxation under the laws of the former Territory of Arizona.

3. That the Assessor of and for the County and former Territory aforesaid, duly elected, appointed, qualified and acting as such, under and by virtue of the laws of the former Territory of Arizona, and at the times and in the manner required by law, for each of the years for which taxes are hereinafter shown to have been assessed and levied thereon, did proceed to list and assess the full cash value for taxation of said tracts of land; and did so list and assess the value of each tract thereof, the improvements thereon, and all personal property belonging to the owner thereof, separately, and did at the times and in the manner and form, as required by law, for each of the years for which taxes are hereinafter shown to have been assessed and levied thereon, proceed to list and assess the values for taxation of said tracts of land, and did so list and assess the value of each tract thereof separately, and did at all times and in the manner and form as required by law, for each of the years as hereinafter shown, for which said tracts of land were so listed and assessed for taxation, make a tax list or assessment-roll for his said county, containing a complete list of all of the taxable property, both real estate and personal property of said county, and did enter thereon in alphabetical and numerical order, each of the said above-described tracts of

land, and did, on or before the third Monday in June, of each year of the said years in which the said respective assessments were made, and after the first Monday in February next preceding each of the said years, for which said assessments were made respectively, make out and deliver to the clerk of the board of supervisors of said County, the tax list or assessment-roll so made, as aforesaid, to which was attached his certificate; and did also, for each of said years, and during the said times, in a book, make a map or plan of the various blocks within incorporated cities or towns, and mark thereon the various subdivisions as they were assessed, and in each subdivision mark the name of the person to whom it was assessed; and did, [26] at the time of delivering said assessment-roll, deliver said map-book to the said clerk. Said assessor did at said time also deliver to the said clerk all of the original lists of property given to him, all of which were filed in the office of said clerk. That immediately thereafter during each of said years, said clerk of the board of supervisors did give notice of the fact of the filing of said tax list or assessment-roll, in his office, specifying in said notice the time and meeting of the board of equalization, by publishing in one newspaper, in the manner directed by the board of supervisors of said County. And said clerk did keep the said tax lists or assessment-roll, open in his office for public inspection thereafter for the period of time required by law. That the county board of equalization for the aforesaid county did, at the time and in the

manner and form required by law, for each of said years, proceed to equalize and adjust said valuations and assessments, and did give due and lawful notice to all persons interested therein, that said board would meet at the time and place as prescribed by law to hear appeals from said valuations and the assessments of said assessor, and from its action in raising and equalizing assessments and valuations and did do all other things in this connection as required by law. That immediately after the adjournment of the board of equalization in July of each of said years, the said board of supervisors caused the said clerk to make an abstract of the assessment-roll, as required by law, in duplicate, and transmit a copy thereof, to the then territorial auditor, which said abstract was laid before the then territorial board of equalization, as required by law. That said assessments and valuations, for each of said years, were duly equalized by the then territorial board of equalization, as the law required. That a statement of the changes, if any, which were made in the assessment by the then territorial board of equalization for each of said years, was duly certified to the clerk of the board of supervisors aforesaid, by the then territorial auditor, together with the rate of taxes, which was to be levied and collected within said county for territorial purposes. That said equalized assessment-roll was thereafterwards corrected, and adjusted, and the valuations thereon duly extended as so equalized, by and in accordance with the decisions of the then territorial board of equalization and the said

county board of equalization. That after such final valuations, adjustments and assessments, so made as aforesaid, and under and by virtue of the laws of the then said territory in full force and effect, until the times hereinafter mentioned the duly elected, qualified and acting officers and agents of the then said territory and county having full legal authority so to do, in the manner and form, and at the times and places as by law the same is required to be done, did, by orders of record fixing the rates thereof, within the limits required by law, levy upon said real estate and the personal property assessed therewith, as so listed, valued, assessed and adjusted, in due proportion to its full cash valuation as so listed, valued, assessed and adjusted, certain territorial, county, school, and other taxes on the separate tracts of said real estate, for the years and in favor of the several funds, and for the purposes and to the amounts, all as set out and as will appear in the following schedule, to wit:

That the Alto Copper Company is a corporation, organized under the laws of the State of Maine; that the Santa Cruz Mines & Smelter Company is a corporation, organized under the laws of the State of Arizona; that the Consolidated Mines, Smelter and Transportation Company is a corporation, organized under the laws of the State of Delaware; that Alexander I. McLeod, L. J. Williams and Wilbur L. Davis, constitute the bondholders' committee of the Alto Copper Company and the Santa Cruz Mines and Smelter Company; that the Santa Rita Company is a corporation, organized under the laws of the State of New York; [27]

Patented Mines known as "The Alta Group."

State and County Taxes
Kind of Taxes

Funds and Amounts Due to Each Fund.

Year Tax Levied		Real est'e and Imps	Personal Property	State Taxes	County Taxes	State Tax Fund	County Road Fund	County General Fund	State Refunding Int. Fund	Penna County Redemption Fund	Penna Co. bond. int Fund	Co. Sch'l Fund	Ct. house bond Int Fund	N.C. R. R. Bd. Int. Fund	State Road Fund	Total Tax for Each Year	Int. due to date	Fees for making up Each Tax	Total Int + Fees for yr	Amt. of Tax for all yrs
1910		16,700	300	175.10	515.78	151.30	43.18	248.20	12.92	21.76	25.74	129.54	12.92	34.34	10.88	544.00	146.88	3.60	694	48
1911		19,824.80	1075	180.18	588.94	156.20	48.08	276.39	11.99	24.16	28.90	156.20	19.14	36.07	11.99	668.80	0.32	3.60	772	72
1912		19824.80	825	206.26	644.51	191.43	25.62	308.48	14.83	31.88	31.88	191.43	21.25	33.97		825.99	24.78	3.60	854	37
																2038.79	271.98	10.80	2321.57	

STATE OF ARIZONA
COUNTY OF SANTA CRUZ } ss.

BACK TAX BILL—EXHIBIT A

I, Raymond R. Earhart Treasurer and Ex-Officio Tax Collector within and for the County of Santa Cruz, in the State of Arizona, do hereby certify that the following amounts of Back Taxes remain delinquent in favor of the several funds for the several years, and on the Real Estate lying and being situate in said County and State, set opposite thereto, to-wit:—

Current No.	Name of Present Owner	Years for which Taxes are Due	Name of Owner at Time of Assessment	Description	Sec. Lot	Twp. Blk.	Range	Acres	No. of Acres
				Patented Mines known as "Alto Group"	Real	Est.	Imp.		per property
116		1910	Consolidated Mines Smelter & Transportation Co.	Mineral West	500	–			
				Albert	500	–			
				" No. 2	500	–			
				Oak	500	–			
				Ophir No. 2	500	–			
				Excelsior West	500	–	2	900	300
				Excelsior	500	–			
				Hillside	500	–			
				Buena Vista	500	–			
				Omaha	500	–			
				Great Eastern	500	–			
				Record	500	–			
				Albion	500	–			
				Steinfeld	500	–			
				Alto	2 500	–	1	500	
				Alto East	500	–			
				Grand Prize	500	–			
				Ophir No. 1	500	–			
				Mineral No. 1	500	–			
				" " 2	500	–			
				Steinfeld West	500	–			
					12 500		4	200	300

Description	State Taxes	County Taxes	State Fund Tax	Co. General Tax	Co. Road Tax	Pima Co. Bonds Tax	Pima Co. Refunding Tax	Orphans Ad. Tax	State Ref. Bd. Tax	N.G. R.R. Bds. Tax	State Road Tax
Mineral West	5 15	15 17	4 45	7 30	1 27	76	64	38	38	1 01	32
Albert	5 15	15 17	4 45	7 30	1 27	76	64	38	38	1 01	32
" No. 2	5 15	15 17	4 45	7 30	1 27	76	64	38	38	1 01	32
Oak	5 15	15 17	4 45	7 30	1 27	76	64	38	38	1 01	32
Ophir No. 2	5 15	15 17	4 45	7 30	1 27	76	64	38	38	1 01	32
Excelsior West	36 05	106 19	31 15	51 10	8 89	5 22	4 48	2 66	2 66	7 07	2 24
Excelsior	5 15	15 17	4 45	7 30	1 27	76	64	38	38	1 01	32
Hillside	5 15	15 17	4 45	7 30	1 27	76	64	38	38	1 01	32
Buena Vista	5 15	15 17	4 45	7 30	1 27	76	64	38	38	1 01	32
Omaha	5 15	15 17	4 45	7 30	1 27	76	64	38	38	1 01	32
Great Eastern	5 15	15 17	4 45	7 30	1 27	76	64	38	38	1 01	32
Record	5 15	15 17	4 45	7 30	1 27	76	64	38	38	1 01	32
Albion	5 15	15 17	4 45	7 30	1 27	76	64	38	38	1 01	32
Steinfeld	5 15	15 17	4 45	7 30	1 27	76	64	38	38	1 01	32
Alto	41 20	121 36	35 60	58 90	10 16	6 08	5 12	3 04	3 04	8 08	2 56
Alto East	5 15	15 17	4 45	7 30	1 27	76	64	38	38	1 01	32
Grand Prize	5 15	15 17	4 45	7 30	1 27	76	64	38	38	1 01	32
Ophir No. 1	5 15	15 17	4 45	7 30	1 27	76	64	38	38	1 01	32
Mineral No. 1	5 15	15 17	4 45	7 30	1 27	76	64	38	38	1 01	32
" " 2	5 15	15 17	4 45	7 30	1 27	76	64	38	38	1 01	32
Steinfeld West	5 15	15 17	4 45	7 30	1 27	76	64	38	38	1 01	32
Total	175 10	515 98	151 30	248 20	43 18	25 74	21 76	12 92	12 92	34 34	10 88

Description	Road-Bridge Bond Int. Tax	Road-Bridge Bond Red. Tax	Highway Imp. Bond Int.	Highway Imp. Bond Red.	Bridge Loan Int.	Co. Funding Int.	Co. Funding Red.					Season Tax	Total Tax for Each Year	Interest Due	Clerk's Fees Due for making Back Tax Book	Total Am't Tax Int. and Clerk's Fees due at time of making Back Tax Book	Aggregate Tax, Interest and Clerk's Fees Due for all Years
Mineral West												3 81	16 –	4 32	5.60 15		20 47
Albert												3 81	16 –	4 32	" 15		20 47
" No. 2												3 81	16 –	4 32	" 15		20 47
Oak												3 81	16 –	4 32	" 15		20 47
Ophir No. 2												3 81	16 –	4 32	" 15		20 47
Excelsior West												66 67	112 –	30 24	39.20 45		142 69
Excelsior												3 81	16 –	4 32	5.60 15		20 47
Hillside												3 81	16 –	4 32	" 15		20 47
Buena Vista												3 81	16 –	4 32	" 15		20 47
Omaha												3 81	16 –	4 32	" 15		20 47
Great Eastern												3 81	16 –	4 32	" 15		20 47
Record												3 81	16 –	4 32	" 15		20 47
Albion												3 81	16 –	4 32	" 15		20 47
Steinfeld												3 81	16 –	4 32	" 15		20 47
Alto												30 48	128 –	34 56	44.80 30		162 86
Alto East												3 81	16 –	4 32	5.60 15		20 47
Grand Prize												3 81	16 –	4 32	5.60 15		20 47
Ophir No. 1												3 81	16 –	4 32	5.60 15		20 47
Mineral No. 1												3 81	16 –	4 32	5.60 15		20 47
" " 2												3 81	16 –	4 32	5.60 15		20 47
Steinfeld West												3 81	16 –	4 32	5.60 15		20 47
													544 00	146 88 190.40	3 60		
Total												129 54					

Total Amount of Taxes for all the years and Interest and Clerk Board of Supervisors Fees $ 694 48

IN WITNESS WHEREOF, I have hereunto set my hand at Nogales in said County and State, this 15th day of March 1913.

Treasurer and Ex-Officio Tax Collector Raymond R. Earhart
within and for the County of Santa Cruz, State of Arizona

STATE OF ARIZONA
COUNTY OF SANTA CRUZ } ss.

BACK TAX BILL—EXHIBIT A-1

I Raymond R. Earhart Treasurer and Ex-Officio Tax Collector within and for the County of Santa Cruz, in the State of Arizona, do hereby certify that the following amounts of Back Taxes remain delinquent in favor of the several funds for the several years, and on the Real Estate lying and being situate in said County and State, set opposite thereto, to-wit:—

CURRENT No.	NAME OF PRESENT OWNER	YEARS FOR WHICH TAXES ARE DUE	NAME OF OWNER AT TIME OF ASSESSMENT	DESCRIPTION	SEC. LOT Real	TWP. BLK. Estate	Imp.	Per. Property	NO. OF ACRES	STATE TAXES	COUNTY TAXES	State ~~CO.-GEN.~~ TAX Fund	Co. ~~CO.-SCH.~~ Gen'l TAX	CO. ROAD TAX	Pima Co. Sch. Cert. TAX	Pima Co. [illegible] TAX	Co. [illegible] TAX	State [illegible] TAX	N.G. R.R. Bd. TAX	State Road TAX	Road Bridge BOND INT TAX	Road Bridge BOND RED. TAX	RIGHT IMP BOND INT	RIGHT IMP BOND RED.	BRIDGE LOAN INT	CO. FUNDING INT	CO. FUNDING RED					School Tax	TOTAL TAX FOR EACH YEAR	~~Interest Due~~ [illegible]	Clerk's Fees Due For making Back Tax Book	Total Am't Tax Int. and Clerk's Fees Due at time of making Back Tax Book	Aggregate Tax, Interest and Clerk's Fees Due for all Years
116	As set forth in Exhibit "A"	1911	Consolidated Mines Smelter and Transportation Co.	Patented Mines known as Alto																																	
				Group: Mineral West	700	00			20	6 03	19 73	5 23	9 26	1 61	97	81	64	40	1 21	40												5 23	22 40	3 36	15		25 91
				Albert	700	00			20	6 03	19 73	5 23	9 26	1 61	97	81	64	40	1 21	40												5 23	22 40	3 36	15		25 91
				Albert No. 2	700	00			20	6 03	19 73	5 23	9 26	1 61	97	81	64	40	1 21	40												5 23	22 40	3 36	15		25 91
				Oak	700	00			20	6 03	19 73	5 23	9 26	1 61	97	81	64	40	1 21	40												5 23	22 40	3 36	15		25 91
				Ophir No. 2	575	50			16.42	4 96	16 22	4 30	7 64	1 32	79	66	52	33	99	33												4 30	18 42	2 76	15		21 33
				Excelsior West	700	00	2650	1075	20	33 16	124 68	33 08	58 54	10 18	6 10	5 09	4 06	2 54	7 63	2 54												33 08	141 60	21 24	45		163 29
				Excelsior	700	00			20	6 03	19 73	5 23	9 26	1 61	97	81	64	40	1 21	40												5 23	22 40	3 36	15		25 91
				Hillside	700	00			20	6 03	19 73	5 23	9 26	1 61	97	81	64	40	1 21	40												5 23	22 40	3 36	15		25 91
				Buena Vista	442	75			12.65	3 82	12 48	3 32	5 86	1 02	61	51	40	25	76	25												3 32	14 17	2 13	15		16 45
				Doman	700	00			20	6 03	19 73	5 23	9 26	1 61	97	81	64	40	1 21	40												5 23	22 40	3 36	15		25 91
				Great Eastern	700	00			20	6 03	19 73	5 23	9 26	1 61	97	81	64	40	1 21	40												5 23	22 40	3 36	15		25 91
				Record	700	00			20	6 03	19 73	5 23	9 26	1 61	97	81	64	40	1 21	40												5 23	22 40	3 36	15		25 91
				Albion	700	00			20	6 03	19 73	5 23	9 26	1 61	97	81	64	40	1 21	40												5 23	22 40	3 36	15		25 91
				Steinfeld	700	00			20	6 03	19 73	5 23	9 26	1 61	97	81	64	40	1 21	40												5 23	22 40	3 36	15		25 91
				Steinfeld West	700	00			20	6 03	19 73	5 23	9 26	1 61	97	81	64	40	1 21	40												5 23	22 40	3 36	15		25 91
				Alto	2500	00	1500		10	34 56	112 64	29 92	52 80	9 20	5 52	4 64	3 68	2 32	6 88	2 32												29 92	128 00	19 20	60		147 50
				Alto East	700	00			20	6 03	19 73	5 23	9 26	1 61	97	81	64	40	1 21	40												5 23	22 40	3 36	15		25 91
				Grand Prize	700	00			20	6 03	19 73	5 23	9 26	1 61	97	81	64	40	1 21	40												5 23	22 40	3 36	15		25 91
				Ophir No. 1	256	55			7.33	2 20	7 24	1 90	3 39	60	36	30	24	15	45	15												1 90	8 21	1 23	15		9 59
				Mineral No. 1	700	00			20	6 03	19 73	5 23	9 26	1 61	97	81	64	40	1 21	40												5 23	22 40	3 36	15		25 91
				Mineral No. 2	700	00			20	6 03	19 73	5 23	9 26	1 61	97	81	64	40	1 21	40												5 23	22 40	3 36	15		25 91
					15674	80	4150	1075		180 18	588 94	156 20	276 39	48 08	28 90	24 16	19 14	11 99	36 07	11 99												156.20	668.80	100.37 153.99	3.60		

Total Amount of Taxes for all the years and Interest and Clerk Board of Supervisors Fees $ 772 72

826.32

IN WITNESS WHEREOF, I have hereunto set my hand at Nogales in said County and State, this 15th day of March 1913

Treasurer and Ex-Officio Tax Collector Raymond R. Earhart
within and for the County of Santa Cruz, State of Arizona.

STATE OF ARIZONA
COUNTY OF SANTA CRUZ } ss.

BACK TAX BILL—EXHIBIT A-2

I, Raymond R. Earhart Treasurer and Ex-Officio Tax Collector within and for the County of Santa Cruz, in the State of Arizona, do hereby certify that the following amounts of Back Taxes remain delinquent in favor of the several funds for the several years, and on the Real Estate lying and being situate in said County and State, set opposite thereto, to-wit:—

CURRENT No.	NAME OF PRESENT OWNER	YEARS FOR WHICH TAXES ARE DUE	NAME OF OWNER AT TIME OF ASSESSMENT	DESCRIPTION (Patented Mines known as the "Alto Group")	SEC. LOT	TWP. BLK.	RGE.	SURVEY	NO. OF ACRES	STATE TAXES	COUNTY TAXES	State Co. Gen. TAX	Co. General TAX	CO. ROAD TAX	Alto Sch. Dist. No. 24 TAX	Town Co. Sch. Dist. No. 1 TAX	Patagonia Sch. Dist. No. 6 TAX	Co. School Dist. No. 16 TAX	H.S. Co. City Sch. Dist. TAX	STATE REFG. BOND INT. TAX	Road Bridge BOND INT. TAX	Road Bridge BOND RED. TAX	HIGHT IMP. BOND INT. TAX	HIGHT IMP. BOND RED. TAX	BRIDGE LOAN INT.	CO. FUNDING INT	CO. FUNDING RED	School Tax	TOTAL TAX FOR EACH YEAR	Interest Due 1/1/1923 for Each Year	Clerk's Fees Due For making Back Tax Book	Total Amt. & Tax Int. and Clerk's Fees due at time of making Back Tax Book	Interest Tax Interest and Clerk's Fees due for all Years
										Dolls. Cts.	Dolls. Cts.	Dolls. Cts.	Dolls. Cts.	Dolls. Cts.	Dolls. Cts.	Dolls. Cts.	Dolls. Cts.	Dolls. Cts.	Dolls. Cts.	Dolls. Cts.	Dolls. Cts.	Dolls. Cts.	Dolls. Cts.	Dolls. Cts.	Dolls. Cts.	Dolls. Cts.	Dolls. Cts.	Dolls. Cts.	Dolls. Cts.	Dolls. Cts.	Dolls. Cts.	Dolls. Cts.	Dolls. Cts.	Dolls. Cts.
116	As set forth in Exhibit "A"	1912	Alto Copper Co.,	Mineral West	700	00			20.-	6 99	21 85	6 99	10 46	87	50	108	108	72	115									649	28 00	84	7 09 15		2859
			A. Steinfeld and	Albert	700	00			20.-	6 99	21 85	6 99	10 46	87	50	108	108	72	115									649	28 00	84	" 15		2859
			H. S. Guerin, Receivers	Albert No. 2	700	00			20.-	6 99	21 85	6 99	10 46	87	50	108	108	72	115									649	28 00	84	" 15		2859
				Alto	47	50			16.42	5 35	19 96	5 33	8 59	72	42	89	89	59	95									533	23 02	69	2 53 15		2336
			formerly assessed	Freeman West	700	00	650	825	20.00	27 94	87 87	20 16	32 98	269	158	356	356	224	388									2016	87 00	261	7 29 45		9006
			and known as the	Freeman	700	00			20.-	6 99	21 85	6 99	10 46	87	50	108	108	72	115									649	28 00	84	" 15		2859
			Consolidated Mines	Mitchell	700	00			20.-	6 99	21 85	6 99	10 46	87	50	108	108	72	115									649	28 00	84	" 15		2859
			Smelter and Trans-	Buena Vista	44	75			12.65	4 42	13 82	4 10	6 62	55	32	68	68	46	73									410	17 71	53	4 87 15		1839
			portation Co.	Bonsan	700	00			20.-	6 99	21 85	6 99	10 46	87	50	108	108	72	115									649	28 00	84	7 01 15		2859
				Great Eastern	700	00			20.-	6 99	21 85	6 99	10 46	87	50	108	108	72	115									649	28 00	84	" 15		2859
				Record	700	00			20.-	6 99	21 85	6 99	10 46	87	50	108	108	72	115									649	28 00	84	" 15		2859
				Albion	700	00			20.-	6 99	21 85	6 99	10 46	87	50	108	108	72	115									649	28 00	84	" 15		2859
				Steinfeld	700	00			20.-	6 99	21 85	6 99	10 46	87	50	108	108	72	115									649	28 00	84	" 15		2859
				Steinfeld West	700	00			20.-	6 99	21 85	6 99	10 46	87	50	108	108	72	115									649	28 00	84	" 15		2859
				Alto	2500	00	3500		20.-	59 95	187 25	55 62	89 60	742	483	927	927	618	989									8562	240 00	720	20 64 30		24750
				Alto East	700	00			20.-	6 99	21 85	6 99	10 46	87	50	108	108	72	115									649	28 00	84	7 01 15		2859
				Grand Prize	700	00			20.	6 99	21 85	6 99	10 96	87	50	108	108	72	115									649	28 00	84	" 15		2859
				Ophir No. 1	256	85			7.33	2 56	8 01	2 38	3 83	32	18	40	40	26	42									238	10 26	31	1 07 15		1072
				Mineral No. 1	700	00			20.-	6 99	21 85	6 99	10 46	87	50	108	108	72	115									649	28 00	84	2 01 15		2859
				Mineral No. 2	700	00			20.-	6 99	21 85	6 99	10 46	87	50	108	108	72	115									649	28 00	84	" 15		2859
																												8259	2478	360		
					15675	80	4150	825		206 26	644 51	191 93	308 46	2562	1483	3188	3188	2125	3397									191 93					

Total Amount of Taxes for all the years and Interest and Clerk Board of Supervisors Fees $ 5437

IN WITNESS WHEREOF, I have hereunto set my hand at Nogales in said County and State, this 15th day of March 1923

Treasurer and Ex-Officio Tax Collector Raymond R. Earhart
within and for the County of Santa Cruz, State of Arizona

The Alto Copper Company, a corporation, The Santa Cruz Mines & Smelter Company, a corporation, The Consolidated Mines Smelter & Transportation Company, a corporation, Alexander I. McLeod, L. J. Williams, and Wilbur L. Davis, constituting the bondholders' committee of the said The Alto Copper Company, and of the said The Santa Cruz Mines & Smelter Company; The Santa Rita Company, a corporation, organized under the laws of the State of New York, Arizona Copper Estate, a corporation, organized under the laws of Arizona, James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisy Belle Bouldin, James E. Bouldin, Jane Doe Bouldin, J. E. Wise, and Lucia Wise, his wife, and Albert Steinfeld, and Henry F. Guerin, Receivers. [32] That the Arizona Copper Estate is a corporation, organized under the laws of the State of Arizona; and that the residence of James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisy Bell Bouldin, James E. Bouldin and Jane Doe Bouldin are unknown to plaintiff; and that Albert Steinfeld and Henry Guerin, are receivers for the Alto Copper Company, the Santa Cruz Mines and Smelting Company and the Consolidated Mines, Smelter and Transportation Company.

Amounting in the aggregate, for all of the aforesaid years upon all of the aforesaid tracts of land, to the sum of two thousand and thirty-eight 79/100

($2,038.79) Dollars, all of which will fully appear from a tax bill hereto attached, and filed with and made a part of this petition, fully authenticated by certificate of the treasurer and *ex-officio* tax collector within and for said county.

4. That all of said taxes so assessed and levied as aforesaid, for the years and purposes aforesaid, to the amounts aforesaid, and against said above-described tracts of land respectively as aforesaid, became and were and still are delinquent, and together with interest, penalties, fees and costs thereon, remain due and unpaid.

5. That all of said lists and assessments for said years were, by the proper officers, and as required by law, properly adjusted, corrected and extended; and, thereafter within the time required by law, for each of said years, the then acting clerk of the board of supervisors of said county did make a fair copy of the same into a duplicate assessment-roll, containing all lands and other property in said county, including the above-described tracts of land and showing taxes due thereon as hereinbefore shown, duly certified and authenticated by the seal of said board of supervisors, for the use of said collector, and as soon thereafter [33] as might be and after such correction and adjustment thereof, the same to be delivered to the then properly elected, appointed, qualified, acting tax collector of said county. That as soon as the said board of supervisors had levied the taxes, as provided by law, they added up the columns of valuations and entered the total of valuation of each description of prop-

erty on the roll and caused a true copy of said assessment-roll to be made, which was styled "A Duplicate Assessment-Roll," with territorial, county and other taxes, and totals of taxes to each person or name carried out in the separate money columns and carefully footed up the several taxes therein levied, and gave to the county treasurer of said county a statement thereof, which said treasurer immediately charged the amount of such taxes to the tax collector of the said county, and said taxes were by the board of supervisors charged to the county treasurer. That immediately thereafter the chairman of the board of supervisors did annex to said duplicate assessment-roll, under his hand, a warrant, commanding the tax collector to collect from the several persons named in said roll the several sums mentioned in the last column of said roll, opposite their respective names, on or before the third Monday in December, then next. That said duplicate assessment-roll, and also the plat or map-book aforesaid, were duly delivered to the tax collector on or before the third Monday in Sept. of each of said years. That each tax collector, within and for the county and the then territory aforesaid, for the respective years aforesaid, did, within the times and in the manner prescribed by law, give due notice to the taxpayers of said county, of the times and places when and where he would meet them to receive their taxes, and in accordance therewith attended at such times and places, and thereafterwards diligently endeavored, and used all lawful means to collect the taxes hereinbefore mentioned,

upon the real estate aforesaid, extended as aforesaid upon the said book, delivered to him as aforesaid, but was unable to collect the same, and did thereafter make a delinquent list for all taxes specified on said book so [34] delivered to him, against the land and town lots, which he had been unable to collect, and complied with said laws in the manners and form, and at the times prescribed therein, and being unable to collect the aforesaid taxes against the real estate aforesaid, first having diligently endeavored and used all lawful means to collect the same, as in said laws required, stated in said list the amount of taxes due on said first above-described real estate, and each tract thereof respectively, with a full description of the same, and did thereafter in due time, return to the board of supervisors duly certified and delinquent lists, so made out by him as required by law, upon each of which lists, and included therein and accompanying the same, for appropriate years, were the delinquent taxes aforesaid then due upon the several tracts of real estate aforesaid so extended upon the tax-book delivered to him aforesaid. That after each return of said delinquent lists, all things required by law were done and performed, within the proper times and in the proper manner and form, and by proper officers of said county, in relation to said delinquent lists and the taxes upon said real estate. That after each of said returns of the then clerk of the board of supervisors, as by law required, and within the times required, made a back tax book, and complied in the making thereof with all

the requirements of the law, upon each of which back tax-books, and included therein for the appropriate years, were entered and shown, as part thereof, all the land delinquent in said county including the said above-described tracts, and opposite thereto the names of the owners, except when the same were not known, and when not known, the names of the persons to whom said respective tracts were last assessed, the description thereof, the respective year or years for which each of said respective tracts was delinquent, the amount of the original tax due each fund on each of said respective tracts, all as fully set out and shown in the foregoing schedule, together with the interest on the whole of [35] said taxes at the time of making said back tax books, and all clerk's fees then due, and the aggregate amount of taxes, interest and clerk's fees charged against each of said several and respective tracts for all the years for which the same was delinquent.

6. That upon the completion of each of said back tax-books, the same was, by the clerk of the board of supervisors aforesaid, delivered to the then tax collectors as aforesaid, for the purpose of collecting the taxes contained therein. That thereafter the said collector proceeded to collect the taxes contained in said back tax book, as required by law, and made diligent endeavor so to do, but was after due diligence unable to collect the said taxes against said real estate, so with the other lands described and contained in said back tax books, nor has the said described real estate been redeemed up to the

present time from the lien of the former Territory of Arizona, and of the present State of Arizona, which exists upon the same, as hereinafter set forth.

7. That under and by virtue of the laws in such cases made and provided, there are due and unpaid upon the taxes so assessed and levied, and remaining unpaid upon the several tracts of land hereinbefore described, divers sums as penalties, interest and costs, as follows, to wit:

On taxes delinquent and unpaid as aforesaid on said "The Alto Group" two hundred seventy-one 98/100 dollars, penalty and interest, and ten and 80/100 ($10.80) dollars costs.

All of which will more fully appear from the duly certified and authenticated tax bill herewith filed. That the total amount of taxes, interest, penalties and costs delinquent, due and unpaid upon all the above-described tracts of land, for the years aforesaid, amount in the aggregate to the sum of $2,321.57/100 dollars.

That all of said tracts of land, together with the taxes due thereon, as above set out, were duly and properly returned delinquent more than sixty days next before the filing of this [36] petition.

That all of said amounts above set out, together with all interest, commissions, penalties and costs thereon accrued under and by virtue of the statutes in such cases made and provided remain due and unpaid.

8. Plaintiff further alleges that under and by virtue of the statutes of the State of Arizona, in such cases made and provided, all taxes assessed

and levied upon each of said respective tracts of real estate, and the personal property assessed therewith, became and are a first and paramount lien in favor of the State of Arizona, on each of said tracts, respectively, to the amount of said taxes, interest, penalties and costs so assessed, levied and accrued thereon, and that under and by virtue of said statutes said lien upon said real estate for all of said taxes due thereon, as well as for all interest, penalties and costs accrued on the same, is retained in favor of said state, and power is by said statutes conferred on said state to enforce said lien by suit, in courts of competent jurisdiction without regard to the amount involved, at the relation and to the use of the tax collector of the county wherein said real estate is situated.

9. That by virtue of the statutes of the State of Arizona, the aforesaid tax collector, realtor herein, made an agreement in writing with and employed W. A. O'Connor, as attorney in prosecuting this suit and all others for delinquent taxes in said county; said attorney to receive as fees therefor fifteen per centum of the amount collected and paid into the treasury, for the prompt and faithful performance of his duties under said agreement; which said agreement between said collector and said attorney was approved by the board of supervisors of said county, by order of record entered the 5th day of March, 1912, the said per centum to be taxed as costs in the suit and collected as other costs.

Wherefore plaintiff, the State of Arizona, at the relation of and to the use aforesaid, prays judgment for the said sum of [37] twenty-three hundred twenty-one 57/100 ($2321.57/100) dollars, the aggregate amount of taxes, interest, penalties and costs, due on said land as aforesaid, TOGETHER WITH THE COSTS OF THIS SUIT, IN ADDITION TO THE SAID SUM, against said defendant and that the same be declared a first and paramount lien in favor of the State of Arizona, and all equities of redemption foreclosed, and that the said lien be enforced and said real estate, or so much thereof as may be necessary to satisfy said judgment, interest, penalties and costs of this suit, be sold, and that an execution or other appropriate process be issued thereon.

W. A. O'CONNOR,
Plaintiff's Attorney.

[Endorsed on back]: Petition in Suit on Delinquent Lands. Filed March 15th, 1923. Edw. L. Mix, Clerk. [38]

In the Superior Court of Santa Cruz County, State of Arizona.

STATE OF ARIZONA ex rel. R. R. EARHART, Tax Collector of Santa Cruz County, Arizona,

Plaintiff,

vs.

ALTO COPPER COMPANY et als.,

Defendants.

DEMURRER.

Come now the defendants in the above-styled cause, and demur to the complaint filed herein, and assign the following grounds of demurrer:

I.

Said complaint fails to state facts sufficient to constitute a cause of action against the defendants, or either of them.

WHEREFORE, defendants pray that plaintiff take nothing against them or either of them in this action, and that they have judgment against plaintiff for costs.

GEORGE W. LEWIS,
Attorney for Defendants.

[Endorsed on back]: Demurrer. Filed this 3d day of July, 1913. Edw. L. Mix, Clerk

Service admitted this 3d day of July, 1913.

W. A. O'CONNOR,
Attorney for Plaintiff. [39]

In the Superior Court of the State of Arizona, in and for the County of Santa Cruz.

No. 155.

THE STATE OF ARIZONA at the Relation and to the Use of RAYMOND R. EARHART, Treasurer and Tax Collector of the County of Santa Cruz,

Plaintiffs,

vs.

ALTO COPPER COMPANY, a Corporation, et al.,
Defendants.

AFFIDAVIT OF RAYMOND R. EARHART.

Raymond R. Earhart, being first duly sworn, deposes and says that he is the same Raymond R. Earhart at whose relation and use the above-entitled action has been commenced and is maintained. That the defendant, Henry F. Guerin, receiver, is a nonresident of the State of Arizona, and is absent from the state, and is a resident, as affiant is informed and believes, of the State of Ohio, and resides in the city of Columbus in said state, but that the street number and address of said Guerin is unknown to this affiant, save and except that his office is in the Hartman Bldg., said city and that all of above facts existed and were true at the time of filing, and during continuance of said action.

RAYMOND R. EARHART.

Subscribed and sworn to before me this 25th day of March, 1914.

[Seal] PHIL HEROLD,
Notary Public.

My commission expires Feby. 23, 1916.

[Endorsed on back]: Affidavit. Filed March 25, 1914. Edw. L. Mix, Clerk. [40]

In the Superior Court of the State of Arizona in and for the County of Santa Cruz.

No. 155.

THE STATE OF ARIZONA at the Relation and to the Use of R. R. EARHART, Treasurer and Tax Collector of the County of Santa Cruz, Arizona,

Plaintiff,

vs.

ALTO COPPER COMPANY et al.,

Defendants.

ORDER FOR FILING AFFIDAVIT NUNC PRO TUNC.

It appearing to the Court that Henry F. Guerin, as receiver, is one of the defendants in the above-entitled cause, and that by inadvertence his name was omitted in the affidavit of publication filed in said cause, but it appearing further that said Guerin was actually served and a copy of the complaint in said cause, with summons attached thereto, was duly served upon him, and the said Guerin being receiver of this Court in another cause, and the Court having jurisdiction over the said Guerin as such receiver.

It is ordered that the plaintiff in the above-entitled cause may now file *nunc pro tunc* an affidavit for service by publication, and that said affidavit when so filed, shall have like force and effect as if filed prior to the service by publication made in the above-entitled cause.

Done at Nogales, Arizona, this 25th day of March, 1914.

W. A. O'CONNOR,
Judge.

[Endorsed on back]: Order. Filed March 25, 1914. Edw. L. Mix, Clerk. [41]

Form 2289K

NIGHT LETTER.

THE WESTERN UNION TELEGRAPH COMPANY,
Incorporated.

25,000 offices in America.

Cable Service to all the World.

This Company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following night letter.

Errors can be guarded against only by repeating a message back to the sending station for comparison, and the Company will not hold itself liable for errors or delays in transmission or delivery of unrepeated night letters, sent at reduced rates, beyond a sum equal to ten times the amount paid for transmission; nor in any case beyond the sum of fifty dollars, at which, unless otherwise stated below, this message has been valued by the sender thereof, nor in any case where the claim is not presented in writing within sixty days after the message is filed with the Company for transmission.

This is an unrepeated night letter, and is de-

livered by request of the sender, under the conditions named above.

ROBERT CLOWRY,
President.

BELVIDERE BROOKS,
General Manager.

6 GS HC & 73 N L

Received at
MB New York Sept 19-13.
Hon. Frank J. Duffy,
Nogales, Ariz.

Thanks for telegram received by telegraph on sixteenth instant from Lewis. First word of hearing on twentieth and his inability to act. One month time absolutely necessary to enable demurrants to employ new *consul* and familiarize him and to substitute and add parties defendant. Practically no delay because service by publication on three mining corporation defendant completed about ten days ago my mailing papers to their office. Have mailed affidavit to above facts.

G. H. GREVILLIER.
825AM [42]

Form 2289K

NIGHT LETTER.

THE WESTERN UNION TELEGRAPH COMPANY,

Incorporated.

25,000 offices in America.

Cable Service to all the World.

This Company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following night letter.

Errors can be guarded against only by repeating a message back to the sending station for comparison, and the Company will not hold itself liable for errors or delays in transmission or delivery of unrepeated night letters, sent at reduced rates, beyond a sum equal to ten times the amount paid for transmission; nor in any case beyond the sum of fifty dollars, at which, unless otherwise stated below, this message has been valued by the sender thereof, nor in any case where the claim is not presented in writing within sixty days after the message is filed with the Company for transmission.

This is an unrepeated night letter, and is delivered by request of the sender, under the conditions named above.

ROBERT CLOWRY,
President.

BELVIDERE BROOKS,
General Manager.

Received at 7 GS AH 76 NL

MB New York Sept. 16 17 1913.

Hon. Frank J. Duffy,

Nogales, Az.

In tax suit against Alto Copper Co. and others just learned by telegram from Geo. W. Lewis who filed demurrer for two of defendants had been appointed clerk United States District Court and could no longer act and that demurrer had been set for hearing Saturday. Kind*lr* adjourn hearing for one month so enable parties to get local counsel and familiarize him with situation. Case may involve Baca Float question. Kindly wire me night letter collect.

G. H. BREVILLIER.

852AM [43]

NIGHT LETTER.

Form 2289.

THE WESTERN UNION TELEGRAPH COMPANY,

Incorporated.

25,000 offices in America.

Cable Service to all the World.

ROBERT CLOWRY,

President.

BELVIDERE BROOKS,

General Manager.

Receiver's No. Time Filed Check

Send the following night letter subject to the terms on back hereof which are hereby agreed to.

Nogales, September 18th, 1913.

G. H. Brevillier,

New York, N. Y.

Hearing of demurrer in tax suit against Alto Copper Company and others was set for September twentieth after being advised by Mr. Lewis that ten days notice was sufficient time.

Defendants insist on hearing. Suggest you take matter up with O'Connor. Showing for further continuance will be necessary if hearing urged.

FRANK J. DUFFY. [44]

Form 1864

THE WESTERN UNION TELEGRAPH COMPANY,

Incorporated.

25,000 offices in America.

Cable Service to all the World.

This Company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following message.

Errors can be guarded against only by repeating a message back to the sending station for comparison, and the Company will not hold itself liable for errors or delays in transmission or delivery of unrepeated messages, beyond the amount of tolls paid thereon, nor in any case beyond the sum of fifty dollars, at which, unless otherwise stated below, this message has been valued by the sender thereof, nor in any case where the claim is not presented in writing within sixty days after

the message is filed with the Company for transmission.

This is an unrepeated message, and is delivered by request of the sender, under the conditions named above.

THEO. N. VAIL,
President.

BELVIDERE BROOKS,
General Manager.

Received at
13 S AH 29

MB New York Sept. 20 1913.

S. F. Noon,
Attorney at Law, Nogales, Az.

Please secure adjournment hearing demurrer Alto tax suit on today so I can acquaint you with situation Heard on sixteen of argument and inability of Lewis attorney to act.

G. H. BREVILLIER.
1025AM [45]

In the Superior Court of Santa Cruz County, State of Arizona.

No. 155.

THE STATE OF ARIZONA, at the Relation and to the Use of RAYMOND R. EARHART, Treasurer and *Ex-Officio* Tax Collector in and for the County of Santa Cruz in the State of Arizona,

Plaintiff,

vs.

THE ALTO COMPANY, a Corporation, et al.,

Defendants.

MOTION FOR HEARING ON DEMURRER.

Comes now the plaintiff in the above-entitled action and moves the Court that the hearing on the demurrer heretofore filed herein be set for an early date.

W. A. O'CONNOR,
Attorney for Plaintiff.

[Endorsed on back]: Motion. Filed August 30th, 1913. Edw. L. Mix, Clerk. [46]

In the Superior Court of Santa Cruz County, State of Arizona.

STATE OF ARIZONA, at the Relation and to the Use of RAYMOND R. EARHART, Treasurer and *Ex-Officio* Tax Collector of Santa Cruz County in the State of Arizona,

Plaintiff,

vs.

THE ALTO COPPER COMPANY, a Corporation, The Santa Cruz Mines & Smelter Company, a Corporation, The Consolidated Mines, Smelter & Transportation Company, a Corporation, Alexander I. McLeod, L. J. Williams and Wilbur L. Davis, Constituting the Bondholders' Committee of the said The Alto Copper Company and the said The Santa Cruz Mines & Smelter Company; The Santa Rita Company, a Corporation Organized under the Laws of the State of New York, Arizona Copper Estate, a Corporation, Organized under the Laws of Arizona, James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisey Belle Bouldin, James E. Bouldin, Jane Doe Bouldin, J. E. Wise, and Lucia Wise, his wife, and Albert Steinfeld and Henry F. Guerin, Receivers,

Defendants.

SUMMONS.

Action Brought in the Superior Court of Santa Cruz County, State of Arizona, and the complaint Filed in said County of Santa Cruz in the office of the Clerk of said Superior Court.

In the Name of the State of Arizona, To The Alto Copper Company, The Santa Cruz Mines & Smelter Company, The Consolidated Mines, Smelter & Transportation Company, Alexander I. McLeod, L. J. Williams, Wilbur L. Davis, The Santa Rita Company, Arizona Copper Estate, James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisey Belle Bouldin, James E. Bouldin, Jane Doe Bouldin, J. E. Wise, Lucia Wise, Albert Steinfeld and Henry F. Guerin, Defendants, GREETINGS:

YOU ARE HEREBY SUMMONED and required to appear in an action brought against you by the above-named plaintiff in the Superior Court of Santa Cruz County, State of Arizona, and answer the complaint therein filed with the clerk of this said court, at Nogales, in said county, within twenty days after the service upon you of this summons, if served in this said county, or in all other cases within thirty days thereafter, the times above mentioned being exclusive of the day of service, or judgment by default will be taken against you.

GIVEN under my hand and the seal of the Superior Court of Santa Cruz County, State of Arizona, this 17th day of April, 1913.

[Seal] EDW. L. MIX,
Clerk of said Superior Court. [47]

Office of the Sheriff,
County of Pima, Arizona,—ss.

I hereby certify that I received the within summons on the 30th day of April, A. D. 1913, at the hour of 9 A. M., and served the same on the 3d day of May, A. D. 1913, upon the Santa Cruz Mines & Smelter Company, a corporation, being one of the defendants named in said summons, by delivering to and leaving with the statutory agent of said Santa Cruz Mines & Smelter Co., the statutory agent of said defendant corporation, at Tucson, county of Pima, State of Arizona, a copy of said summons, to which was attached a true copy of the complaint mentioned in said summons.

Dated this 3d day of May, A. D. 1913.

JOHN NELSON,
Sheriff.
By C. G. HUSS,
Deputy Sheriff.

Fees, service $1.80
Fees, Copies,
Travel, —— Miles .....$
Total .....$

Office of the Sheriff,
County of Santa Cruz, Arizona,—ss.

I hereby certify that I received the within summons on the 25th day of April, A. D. 1913, at the

hour of 10:00 A. M. and served the same on the 22d day of May, 1913, upon J. E. Wise, and Lucia Wise, his wife, being two of the defendants named in said summons, by delivering to and leaving with each of them at the precinct of Calabasas, county of Santa Cruz a copy of said summons, to which was attached a true copy of the complaint mentioned in said summons.

Dated this 22d day of May, A. D. 1913.

W. S. McKNIGHT,
Sheriff.
By F. J. Taylor,
Deputy.

Fees, service $3.00
12 miles 3.60

[Endorsed on back]: Original Summons. Filed May 23d, A. D. 1913. Edw. L. Mix, Clerk. [48]

In the Superior Court of the County of Santa Cruz, State of Arizona.

THE STATE OF ARIZONA, at the Relation and to the Use of R. R. EARHART, Treasurer and *Ex-Officio* Tax Collector, in and for the County of Santa Cruz, State of Arizona,
Plaintiff,

vs.

THE ALTO COPPER COMPANY, a Corporation, The Santa Cruz Mines and Smelter Company, a Corporation, The Consolidated Mines, Smelter and Transportation Company, a Corporation, Alexander I. McLeod,

L. J. Williams and Wilbur L. Davis, as the Bondholders' Committee of The Alto Copper Company and the Santa Cruz Mines and Smelter Company, the Santa Rita Company, a Corporation, the Arizona Copper Estate, a Corporation, James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisy Belle Bouldin, James E. Boudin, Jane Doe Bouldin, Albert Steinfeld and Henry Guerin, Receivers and J. E. Wise and Lucia Wise,

Defendants.

AFFIDAVIT OF NONRESIDENCE.

State of Arizona,
County of Santa Cruz,—ss.

W. A. O'Connor, being first duly sworn, deposes and says that he is the attorney for the plaintiff in the above-entitled action; that the defendants, the Alto Copper Company, a corporation, organized under the laws of the State of Maine, the Santa Cruz Mines and Smelter Company, a corporation, organized under the laws of the State of Arizona, the Consolidated Mines, Smelter and Transportation Company, a corporation organized under the laws of the State of Deleware, the Santa Rita Company, a corporation, organized under the laws of the State of New York, the Arizona Copper Estate, a corporation, organized under the laws of the State of Arizona; that the above-named corporations are, and each of them is doing business in the State of

Arizona, and within Santa Cruz County, and that the said corporations have not, and neither of them has a legally appointed and qualified and constituted agent residing in the State of Arizona, upon whom service of process can be had; that the residences of James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisy Belle Bouldin, James E. Bouldin, and Jane Doe Bouldin are unknown; that Alexander I. McLeod, L. J. Williams and Wilbur L. Davis are, and each of them is a nonresident of the State of Arizona; that to the best of affiant's knowledge and belief of the defendant Alexander I. McLeod, resides in the city of Detroit, State of Michigan, the said Wilbur L. Davis in the city of Waldon, State of Massachusetts, the said L. J. Williams resides in the city of Scranton, State of Pennsylvania; that at the time of filing the complaint in this action, and ever since that time, and now, the said Alexander I. McLeod, the said L. J. Williams, and the said Wilbur L. Davis, have been and now are absent from the State of Arizona. Affiant therefore, asks that service of summons in said action be had by publication thereof, as provided by law.

W. A. O'CONNOR.

Subscribed and sworn to before me this 21st day of March, A. D. 1913.

[Seal] EDW. L. MIX,
Clerk of Superior Court.

[Endorsed on back]: Affidavit of Nonresidence. Filed March 21, 1913. Edw. L. Mix, Clerk. [49]

In the Superior Court of the County of Santa Cruz, State of Arizona.

THE STATE OF ARIZONA, at the Relation and to the Use of R. R. EARHART, Treasurer and *Ex-Officio* Tax Collector, in and for the County of Santa Cruz, State of Arizona,

Plaintiff,

vs.

THE ALTO COPPER COMPANY, a Corporation, the Santa Cruz Mines and Smelter Company, a Corporation, the Consolidated Mines, Smelter and Transportation Company, a Corporation, Alexander I. McLeod, L. J. Williams, and Wilbur L. Davis, as the Bondholders' Committee of the Alto Copper Company and the Santa Cruz Mines and Smelter Company, the Santa Rita Company, a Corporation, the Arizona Copper Estate, a Corporation, James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisy Belle Bouldin, James E. Bouldin, Jane Doe Bouldin, Albert Steinfeld and Henry Guerin, Receivers, and J. E. Wise and Lucia Wise,

Defendants.

State of Arizona,
County of Santa Cruz,—ss.

W. A. O'Connor, being first duly sworn, deposes and says: that he is the attorney for the plaintiff

in the above-entitled action, and as such attorney makes this affidavit; that the defendant The Alto Copper Company is a corporation organized under the laws of the State of Maine, and having its home office, as affiant is informed and believes, and to the best of his information and belief avers, at Bangor, State of Maine; that the Santa Cruz Mines and Smelter Company is a corporation organized under the laws of the State of Arizona, and having its principal place of business at Tucson, in said state; that the Consolidated Mines, Smelter and Transportation Company is a corporation organized under the laws of the State of Delaware, and having its principal office, as affiant is informed and believes, at Dover, said state; that the Santa Rita Company is a corporation organized under the laws of the State of New York, and that the home office or principal office of said corporation is unknown to this affiant; that the Arizona Copper Estate is a corporation organized under the laws of the State of Arizona; that each and all of the above-named corporations are [50] doing business in the State of Arizona, and within Santa Cruz County, said state, and that the said The Alto Copper Company, the said Consolidated Mines, Smelter and Transportation Company and the said Santa Rita Company have not, and neither of them has a legally appointed and constituted agent or any agent residing in or in the State of Arizona upon whom service of process can be had or made; that James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dab-

ney C. T. Davis, Jane Doe Davis, Daisy Belle Bouldin, James E. Bouldin, and Jane Doe Bouldin are each and all nonresidents of the State of Arizona; that the residence of said James W. Vroom and Jane Doe Vroom is 30 Broad Street, city of New York, State of New York, as affiant is informed and believes; that the residence of John Watts and Jane Doe Watts is the city of Denver, State of Colorado, the street number and street being unknown to affiant; that the residence of Cornelius C. Watts and Jane Doe Watts is the city of Charleston, State of West Virginia, the street number and street being unknown to this affiant; that the residence of Dabney C. T. Davis and Jane Doe Davis is the city of Charleston, State of West Virginia, the street number and street being unknown to this affiant; that the residence of Daisy Belle Bouldin, James E. Bouldin and Jane Doe Bouldin is the city of Austin, county of Travis, State of Texas, the street number and street being unknown to this affiant; that the said Alexander I. McLeod, L. J. Williams, and Wilbur L. Davis are, and each of them is a nonresident of the State of Arizona; that the said Alexander I. McLeod's residence is the city of Detroit, State of Michigan, the street number and street being unknown to affiant; that the residence of Wilbur L. Davis is the city of Walden, State of Massachusetts, the street number and street being unknown to this affiant; that the residence of the said L. J. Williams is the city of Scranton, State of Pennsylvania, the street number and street being unknown to affiant; that at the

time of filing the complaint in this action, and ever since, and now, the said Alexander I. McLeod, and the said L. J. Williams, and the said Wilbur L. Davis, and the said James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, Daisy Belle Bouldin, James E. Bouldin, and Jane Doe Bouldin, and each of them have been and now are absent from the State of Arizona, and that the time of filing the said complaint, ever since and now, the said [51] *the said* the Alto Copper Company, and the said Consolidated Mines, Smelter and Transportation Company, and each of them, had no duly appointed or constituted agent, or any agent within the State of Arizona upon whom a service could be made, and no officer of said companies, or either thereof within the State of Arizona, upon whom service could be made; affiant therefore asks that service of summons in said action be made by publication, as provided by law.

W. A. O'CONNOR,

Subscribed and sworn to before me this 12th day of April, A. D. 1913.

My commission expires 2–17th–1916.

[Seal] E. K. CUMMING,
Notary Public.

[Endorsed on back]: Affidavit of Nonresidence. Filed this 12th day of April, 1913. Edw. L. Mix, Clerk of the Superior Court. [52]

In the Superior Court in and for the County of Santa Cruz, State of Arizona.

No. 155.

STATE OF ARIZONA, at the Relation and to the Use of RAYMOND R. EARHART, Treasurer and *Ex-Officio* Tax Collector in and for the County of Santa Cruz in the State of Arizona,

Plaintiff,

vs.

THE ALTO COPPER COMPANY, a Corporation, The Santa Cruz Mines & Smelter Company, a Corporation, The Consolidated Mines, Smelter & Transportation Company, a Corporation, Alexander I. McLeod, L. J. Williams, and Wilbur L. Davis, Constituting the Bondholders' Committee of the Said The Alto Copper Company and of the Said The Santa Cruz Mines & Smelter Company; The Santa Rita Company, a Corporation, Organized Under the Laws of the State of New York, Arizona Copper Estate, a Corporation, Organized Under the Laws of Arizona, James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisy Belle Bouldin, James E. Bouldin, Jane Doe Bouldin, J. E. Wise and Lucia Wise, His Wife, and Albert Steinfeld and Henry F. Guerin, Receivers,

Defendants.

AFFIDAVIT OF MAILING SUMMONS AND COMPLAINT.

State of Arizona,
County of Santa Cruz,—ss.

Raymond R. Earhart, being first duly sworn, deposes and says that he is the plaintiff in the above-entitled action. That on the 25th day of April, A. D. 1913, he deposited in the postoffice at Nogales, Santa Cruz County, Arizona, a copy of the summons and complaint in the above-entitled action, with the postage prepaid thereon, directed to the defendant corporation, The Alto Copper Company, as its supposed principal or home office in the city of Bangor, State of Maine;

That on said date affiant further deposited in said postoffice at Nogales, Arizona, a copy of said summons and complaint, with the postage prepaid thereon, directed to the defendant corporation, The Consolidated Mines, Smelter & Transportation Company, at its supposed principal or home office in the city of Dover, State of Delaware;

That on said date affiant further deposited in said postoffice at Nogales, Arizona, a copy of said summons and complaint, with the postage prepaid thereon, [53] directed to the defendant Alexander I. McLeod at his *proposed* place of residence in the City of Detroit, State of Michigan;

That on said date affiant further deposited in said postoffice at Nogales, Arizona, a copy of said summons and complaint, with the postage prepaid thereon, directed to the defendant L. J. Williams, at

his *proposed* place of residence in the City of Scranton, State of Pennsylvania;

That on said date affiant further deposited in said postoffice at Nogales, Arizona, a copy of said summons and complaint, with the postage prepaid thereon, directed to the defendant Wilbur L. Davis, at his supposed place of residence in the city of Waldon, State of Massachusetts;

That on said date affiant further deposited in said postoffice at Nogales, Arizona, a copy of said summons and complaint, with the postage prepaid thereon, directed to the defendant James E. Bouldin at his proposed place of residence in the city of Austin, Texas;

That on said date affiant further deposited in said postoffice at Nogales, Arizona, a copy of said summons and complaint, with the postage prepaid thereon, directed to the defendant Henry F. Guerin, at his supposed office in the Hartman Building, in the city of Columbus, State of Ohio;

That on said date affiant further deposited in said postoffice at Nogales, Arizona, a copy of said summons and complaint, with the postage prepaid thereon, directed to the defendant, James W. Vroom at his supposed office or place of residence at No. 30 Broad Street, in the City of New York, State of New York;

That on said date affiant further deposited in said postoffice at Nogales, Arizona, a copy of said summons and complaint, with the postage prepaid thereon, directed to the defendant, Jane Doe Vroom, at her supposed office or place of residence at No. 30

Broad Street, in the City of New York, State of New York;

That on said date affiant further deposited in said postoffice at Nogales, Arizona, a copy of said summons and complaint, with the postage prepaid thereon, directed to the defendant, John Watts, at his supposed place of residence in the city of Denver, State of Colorado;

That on said date affiant further deposited in said postoffice at Nogales, Arizona, a copy of said summons and complaint, with the postage prepaid thereon, directed to the defendant Jane Doe Watts, at her supposed place [54] of residence in the city of Denver, State of Colorado;

That on said date affiant further deposited in said postoffice at Nogales, Arizona, a copy of said summons and complaint, with the postage prepaid thereon, directed to the defendant Cornelius C. Watts, at his supposed place of residence in the city of Charleston, State of West Virginia;

That on said date affiant further deposited in said postoffice at Nogales, Arizona, a copy of said summons and complaint, with the postage prepaid thereon, directed to the defendant Jane Doe Watts, at her supposed place of residence, in the city of Charleston, State of West Virginia;

That on said date affiant further deposited in said postoffice at Nogales, Arizona, a copy of said summons and complaint, with the postage prepaid thereon, directed to the defendant Dabney C. T. Davis, at his supposed place of residence in the city of Charleston, State of West Virginia;

That on said date affiant further deposited in said postoffice at Nogales, Arizona, a copy of said summons and complaint, with the postage prepaid thereon, directed to the defendant Jane Doe Davis at her supposed place of residence, in the city of Charleston, State of WestVirginia;

That on said date affiant further deposited in said postoffice at Nogales, Arizona, two copies of said summons and complaint, with the posatge prepaid thereon, directed to the defendant Daisy Belle Bouldin, at her supposed place of residence, in the city of Austin, State of Texas;

That on said date affiant further deposited in said postoffice at Nogales, Arizona, a copy of said summons and complaint, with the postage prepaid thereon, directed to the defendant Jane Doe Bouldin, at her supposed place of residence in the city of Austin, State of Texas;

That on said date affiant further deposited in said postoffice at Nogales, Arizona, a copy of said summons and complaint, with the postage prepaid thereon, directed to the Arizona Corporation Commission at its office in the city of Phoenix, county of Maricopa, State of Arizona, for service by said commission on the defendant corporation the Arizona Copper Estate.

RAYMOND R. EARHART.

Subscribed and sworn to before me this 3d day of June, A. D. 1913.

[Seal] EDW. L. MIX,
Clerk of the Superior Court.

[Endorsed on back]: Affidavit of Mailing. Filed June 3d, 1913. Edw. L. Mix, Clerk. [55]

AFFIDAVIT OF PUBLICATION.

State of Arizona,
County of Santa Cruz,—ss.

Before me, W. A. O'Connor, a notary public in and for the County of Santa Cruz, duly commissioned and sworn, on this day personally appeared E. D. Miller, who being first duly sworn, deposes and says: That he is the editor and proprietor of the "Border Vidette," a paper published at Nogales, Santa Cruz County, State of Arizona, and that the annexed notice or advertisement was published in said newspaper five weeks, the first publication being on May 3d, the 2d on May 10th, the 3d May 17th, the 4th May 24th, 1913, and the last publication being on May 31st, 1913.

Subscribed and sworn to before me at Nogales, this 31st day of May, 1913.

[Seal] W. A. O'CONNOR,
Notary Public.

E. D. MILLER.

(ATTACHED.)

SUMMONS—ACTION No. 155.

In the Superior Court of Santa Cruz County, State of Arizona.

STATE OF ARIZONA, at the Relation and to the Use of RAYMOND R. EARHART, Treasurer and *Ex-Officio* Tax Collector of Santa Cruz County, in the State of Arizona,

Plaintiff,

vs.

THE ALTO COPPER COMPANY, a Corporation, The Santa Cruz Mines & Smelter Company, a Corporation, The Consolidated Mines, Smelter & Transportation Company, a Corporation, Alexander I. McLeod, L. J. Williams, and Wilbur L. Davis, Constituting the Bondholders' Committee of the Said The Alto Copper Company and of the Said The Santa Cruz Mines & Smelter Company; The Santa Rita Company, a Corporation, Organized Under the Laws of the State of New York, Arizona Copper Estate, a Corporation, Organized Under the Laws of Arizona, James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisy Belle Bouldin, James E. Bouldin, Jane Doe Bouldin, J. E. Wise and Lucia Wise, His Wife, and Albert Steinfeld and Henry F. Guerin, Receivers,

Defendants.

Action brought in the Superior Court of Santa Cruz, County, State of Arizona, and the Complaint Filed in Said County of Santa Cruz, in the Office of the Clerk of Said Superior Court.

In the Name of the State of Arizona, to The Alto Copper Company, The Consolidated Mines, Smelter & Transportation Company, Alexander I. McLeod, L. J. Williams, Wilbur L. Davis, The Santa Rita Company, Arizona Copper Estate, James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, [56] Jane Doe Davis, Daisy Belle Bouldin, James E. Bouldin, Jane Doe Bouldin, and Henry F. Guerin, Defendants, GREETING:

You are hereby summoned and required to appear in an action brought against you by the above-named plaintiff in the Superior Court of Santa Cruz County, State of Arizona, and answer the complaint therein filed with the Clerk of said Court, at Nogales, in said county, within twenty days after the service upon you of this summons, if served in this said county, or in all other cases within thirty days thereafter. The times above mentioned being exclusive of the days of service, or judgment by default will be taken against you.

Given under my hand and seal of the Superior Court of Santa Cruz County, State of Arizona, this 17th day of April, 1913.

[Seal] EDW. L. MIX,
Clerk of Said Superior Court.

5–3–5t. [57]

In the Superior Court in and for the County of Santa Cruz, State of Arizona.

STATE OF ARIZONA, at the Relation and to the Use of RAYMOND R. EARHART, Treasurer and *Ex-Officio* Tax Collector in and for the County of Santa Cruz in the State of Arizona,

Plaintiff,

vs.

THE ALTO COPPER COMPANY, a Corporation, The Santa Cruz Mines & Smelter Company, a Corporation, The Consolidated Mines, Smelter & Transportation Company, a Corporation, Alexander I. McLeod, L. J. Williams, and Wilbur L. Davis, Constituting the Bondholders' Committee of the said The Alto Copper Company and of the said The Santa Cruz Mines & Smelter Company; The Santa Rita Company, a Corporation, Organized Under the Laws of the State of New York, Arizona Copper Estate, a Corporation, Organized Under the Laws of Arizona, James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisy Belle Bouldin, James E. Bouldin, Jane Doe Bouldin, J. E. Wise and Lucia Wise, his Wife, and Albert Steinfeld and Henry F. Guerin, Receivers,

Defendants.

AFFIDAVIT OF PUBLICATION.

State of Arizona,
County of Santa Cruz,—ss.

R. R. Earhart being first duly sworn deposes and says that he is the plaintiff in the above-entitled action, and that he caused the summons in the above-entitled action to be published in the "Border Vidette," a newspaper of general circulation printed and published in the town of Nogales, Santa Cruz County, State of Arizona, and that the same was published on the following days in the said paper, to wit: The first publication being on the 3d day of May, 1913, the second publication being on the 10th day of May, 1913, the third publication being on the 17th day of May, 1913; the fourth publication being on the 24th day of May, 1913, and the fifth and last publication being on the 31st day of May, 1913, and that the affidavit hereto attached is the affidavit of the publisher of the said paper referring to aforesaid publications.

RAYMOND R. EARHART.

Subscribed and sworn to before me this 3d day of June, 1913.

[Seal] EDW. L. MIX,
Clerk of the Superior Court.

[Endorsed on back]: Affidavit of Publication. Filed this 3d day of June, 1913. Edw. L. Mix, Clerk of the Superior Court. [58]

In the Superior Court of the County of Santa Cruz, State of Arizona.

THE STATE OF ARIZONA at the relation and to the use of RAYMOND R. EARHART, Treasurer and *Ex-officio* Tax Collector in and for the County of Santa Cruz, in the State of Arizona,

Plaintiff,

vs.

THE ALTO COPPER COMPANY, a Corporation, et al.,

Defendants.

AFFIDAVIT OF MAILING SUMMONS AND COMPLAINT.

State of Arizona,
County of Santa Cruz,—ss.

Raymond R. Earhart, being first duly sworn, upon oath deposes and says, that he is the plaintiff in the above-entitled action, and of twenty-one years and upwards. That on the sixth day of September, A. D. 1913, he deposited in the general postoffice at Nogales, Arizona, with the postage fully prepaid thereon, envelopes containing true copies of the summons and complaint in the above-entitled action, directed as follows:

To the defendant corporation, The Alto Copper Company, C. E. Prior, Secretary, 43 Exchange Place, New York City, the same being the supposed office of the secretary of said corporation.

To the defendant corporation, The Consolidated Mines, Smelter & Transportation Company, C. E. Prior, Secretary, 43 Exchange Place, New York City, the same being the supposed office of the secretary of said corporation.

To the defendant corporation, the Santa Cruz Mines and Smelter Company, C. E. Prior, Secretary, 43 Exchange Place, New York City, the same being the supposed office of the Secretary of said Corporation.

RAYMOND R. EARHART.

Subscribed and sworn to before me this sixth day of September, 1913.

[Seal] EDW. L. MIX,
Clerk of the SuperiorCourt.

[Endorsed on back]: Affidavit. Filed Sept. 8, 1913. Edw. L. Mix, Clerk. [59]

Superior Court, Santa Cruz County. Arizona.

STATE OF ARIZONA ex rel. and to the Use of R. R. EARHART, County Treasurer, etc.,
Plaintiff,

vs.

ALTO COPPER COMPANY et al.,
Defendants.

AFFIDAVIT OF G. H. BREVILLIER.

State, City and County of New York,—ss.

G. H. Brevillier, being first duly sworn, deposes and says: I am an attorney and counsellor at law,

duly admitted to practice in the courts of the State of New York, and am the counsel for the defendant Vroom in the above-entitled action. That in behalf of said defendant and the defendant John Watts, a demurrer was interposed by George W. Lewis, Esq., as their attorney of record.

That on the 16th inst., I received a telegram from said Lewis advising me and my clients for the first time that the demurrer had been set for hearing at Nogales on the 20th inst., and that he could not act for said defendants at the hearing thereof, because he had been appointed Clerk of the United States District Court for Arizona. I thereupon immediately telegraphed to the Hon. F. J. Duffy, Judge of the above court, as follows:

"In tax suit against Alto Copper Company and others just learned *be* telegram that George W. Lewis, who filed demurrer for two of defendants had been appointed Clerk United States District Court and could no longer act, and that demurrer had been set for hearing Saturday. Kindly adjourn hearing for one month to enable parties to get local counsel and familiarize him with situation. Case may involve Baca Float questions. Kindly wire me night letter collect."

This morning I received from Judge Duffy a telegram reading as follows: "Hearing of demurrer in tax suit against Alto Copper Company and others was set for September twentieth after being advised by Mr. Lewis that ten days notice sufficient time. Defendants insist on hearing. Suggest you [60] take matter up with O'Connor. Showing for

further continuance will be necessary if hearing urged."

I thereupon wired to Judge Duffy as follows:

"Thanks for telegram. Received by telegraph on sixteenth instant from Lewis first word of hearing on twentieth and his inability to act. One months time absolutely necessary to enable demurrants to employ new counsel and familiarize him and to substitute and add parties defendant. Practically no delay because service by publication on three mining corporation defendants completed about ten days ago by mailing papers to their officers. Have mailed affidavit to above facts."

I also telegraphed to-day to Hon. William A. O'Connor, attorney for the plaintiff herein, at Nogales, Arizona, as follows:

"Please consent to adjournment hearing Alto tax suit one month to allow time to employ new counsel and familiarize him with case. Did not know of hearing and inability of Lewis to act until Wednesday. Court has notice of this and refusal of adjournment would be reversible on appeal. In reality no delay as service by publication on three defendants with offices here not complete until mailing papers to them about ten days ago. Please answer quick collect."

I am advised by Mr. C. E. Prior, of this city, who is an officer of the three mining corporations who are parties defendant in this action, that a copy of the summons and complaint in this action was first mailed to said three defendant corporations from Nogales on or about the 9th inst., in a service

by publication. Consequently, an adjournment of the hearing on the demurrer will not prejudice the plaintiff, as the plaintiff cannot take judgment against said three corporation defendants until sixty days from the date of mailing of said papers by his attorney, namely: not before the early part of November, 1913. [61]

It is absolutely necessary for an adjournment of the hearing on the demurrer in order to enable my clients to employ a new counsel in Arizona, and to familiarize him with their case, and to confer with him with reference to this action.

The demurrer was interposed in the early part of July and over two and one-half months elapsed before the plaintiff sought to have it tried.

That said adjournment is asked for in good faith and for the purpose of allowing my clients an opportunity to defend this action.

G. H. BREVILLIER.

Sworn to and subscribed before me this 19th day of September, 1913.

[Seal] ADELA M. MASTERSON.

Notary Public, Kings Co., No. 228, Reg. No. 7164
Cert. Filed in New York Co. 88, Reg. No. 522.
Term Expires March 30, 1915.

[Endorsed on back]: Affidavit. Filed Sept. 23, 1913. Edw. L. Mix, Clerk. [62]

In the Superior Court of Santa Cruz County, State of Arizona.

No. 155.

STATE OF ARIZONA, at the Relation and to the Use of RAYMOND R. EARHART, Treasurer and *Ex-officio* Tax Collector in and for the County of Santa Cruz in the State of Arizona,

Plaintiff,

vs.

THE ALTO COPPER COMPANY, a Corporation, et al.,

Defendants.

REQUEST FOR DEFAULT.

To Hon. Edward L. Mix, Clerk of the Above-entitled Court:

Service of summons having been had in the above-entitled action as appears by the Sheriff's return thereof and the affidavits of mailing and publication thereof, and no answer or other appearance, demurrer or motion having been filed for or on behalf of any of the defendants above-named, you will please enter the default of said defendants in said action.

W. A. O'CONNOR,
Attorney for Plaintiff.

[Endorsed on back]: Request for Default. Filed Oct. 16th, 1913. Edw. L. Mix, Clerk. [63]

In the Superior Court of Santa Cruz County, State of Arizona.

STATE OF ARIZONA, at the Relation and to the Use of RAYMOND R. EARHART, Treasurer and *Ex-officio* Tax Collector in and for the County of Santa Cruz, State of Arizona,

Plaintiff,

vs.

THE ALTO COPPER COMPANY, a Corporation, et al.,

Defendants.

DEFAULT.

In this action the defendants The Alto Copper Company, a corporation, The Santa Cruz Mines & Smelter Company, a corporation, The Consolidated Mines, Smelter & Transportation Company, a corporation, Alexander I. McLeod, L. J. Williams and Wilbur L. Davis, constituting the Bondholders' Committee of the said The Alto Copper Company and of the said The Santa Cruz Mines & Smelter Company; the Santa Rita Company, a corporation, Arizona Copper Estate, a corporation, James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisy Belle Bouldin, James E. Bouldin, Jane Doe Bouldin, J. E. Wise and Lucia Wise, his wife, and Albert Steinfeld, and Henry F. Guerin, Receivers, having been regularly served with process, and having failed to appear and answer the Plaintiff's com-

plaint on file herein, and the time for answering allowed by law having expired.

Therefore upon application of plaintiff, the default of the defendants above named in the premises is hereby duly entered according to law.

Given under my hand and seal of the Superior Court of Santa Cruz County, State of Arizona, this 16th day of October, 1913.

[Seal] EDW. L. MIX,
Clerk.

By ————————,
Deputy Clerk.

[Endorsed on back]: Default. Filed October 16th, 1913. Edw. L. Mix, Clerk. [64]

In the Superior Court of Santa Cruz County, State of Arizona.

#155.

STATE OF ARIZONA, at the Relation and to the Use of RAYMOND R. EARHART, Treasurer and *Ex-Officio* Tax Collector of Santa Cruz County in the State of Arizona,
Plaintiff,

vs.

THE ALTO COPPER COMPANY, a Corporation, The Santa Cruz Mines and Smelter Company, a Corporation, The Consolidated Mines, Smelter and Transportation Company, a Corporation, Alexander I. McLeod,

L. J. Williams and Wilbur L. Davis, Constituting the Bondholders' Committee and of the Said The Alto Copper Company and the Said The Santa Cruz Mines and Smelter Company; The Santa Rita Company, a Corporation, Organized Under the Laws of the State of New York; Arizona Copper Estate, a Corporation Organized Under the Laws of Arizona; James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisy Belle Bouldin, James E. Bouldin, Jane Doe Bouldin, J. E. Wise and Lucia Wise, His Wife, and Alfred Steinfeld and Henry F. Guerin, Receivers,

Defendants.

JUDGMENT.

This cause came on regularly for trial on this 5th day of December, A. D. 1913, Frank J. Duffy, Esq., appearing as attorney for the plaintiff, and the defendants not appearing either in person or by counsel, and the defendants having been regularly served with process, and having failed to appear or answer the plaintiff's complaint herein, and the legal time for answering having expired, and the default of the said defendants in the premises having been duly entered according to law; and a jury having been waived, the cause was tried before the Court sitting without a jury, whereupon, evidence was introduced, and the evidence being closed, the cause was submitted to the Court for its delibera-

tion and decision; and the Court having heard all the evidence [65] submitted and having carefully considered the same, and being fully advised in the premises, finds in favor of the plaintiff and against the defendants in the sum of three thousand two hundred and forty-one and 35/100 ($3,241.35) dollars, and ordered judgment to be entered in accordance herewith. It is therefore

ORDERED, ADJUDGED AND DECREED, that taxes of the State of Arizona and County of Santa Cruz are due upon the following described property and the improvements thereon, to wit: The following patented mines situate in the Tyndall Mining District, Santa Cruz County, Arizona, known as the "Alto Group," viz.:

MINERAL WEST, the location notice of which is recorded in Book 1 of Mining Locations, at page 76, Records of Santa Cruz County, Arizona;

ALBERT, the location notice of which is recorded in Book 1 of Mining Locations, at page 58, Records of Santa Cruz County, Arizona;

ALBERT No. 2, the location notice of which is recorded in Book 1 of Mining Locations, at page 73, Records of Santa Cruz County, Arizona;

OAK, the location notice of which is recorded in Book 1 of Mining Locations, at page 52, Records of said Santa Cruz County, Arizona;

OPHIR No. 1, the location notice of which is recorded in Book 5 of Mining Locations, at page 188, Records of said Santa Cruz County, Arizona;

OPHIR No. 2, the location notice of which is

recorded in Book 5 of Mining Locations, at page 189, Records of said Santa Cruz County, Arizona;

EXCELSIOR WEST, the location notice of which is recorded in Book 1 of Mining Locations, at page 93, Records of said Santa Cruz County, Arizona;

EXCELSIOR, the location notice of which is recorded in Book 1 of Mining Locations, at page 85, Records of said Santa Cruz County, Arizona;

HILL SIDE, the location notice of which is recorded in Book 2 of Mining Locations, at page 160, Records of said Santa Cruz County, Arizona;

BUENA VISTA, the location notice of which is recorded in Book 1 of Mining Locations, at page 86, Records of said Santa Cruz County, Arizona;

DONAU, the location notice of which is recorded in [66] Book 1 of Mining Locations, at page 88, Records of Santa Cruz County, Arizona;

GREAT EASTERN, the location notice of which is recorded in Book 2 of Mining Locations, at page 162, Records of said Santa Cruz County, Arizona;

RECORD, the location notice of which is recorded in Book 5 of Mining Locations, at page 191, Records of said Santa Cruz County, Arizona;

ALBION, the location notice of which is recorded in Book 1 of Mining Locations, at page 54, Records of said Santa Cruz County, Arizona;

STEINFELD, the location notice of which is recorded in Book 1 of Mining Locations, at page 56, Records of said Santa Cruz County, Arizona;

STEINFELD WEST, the location notice of which is recorded in Book 1 of Mining Locations, at

page 80, Records of said Santa Cruz County, Arizona;

ALTO, the location notice of which is recorded in Book 1 of Mining Locations, at page 81, Records of said Santa Cruz County, Arizona;

ALTO EAST, the location notice of which is recorded in Book 1 of Mining Locations, at page 82, Records of said Santa Cruz County, Arizona;

GRAND PRIZE, the location notice of which is recorded in Book 1 of Mining Locations, at page 84, Records of said Santa Cruz County, Arizona;

MINERAL No. 1, the location notice of which is recorded in Book 1 of Mining Locations, at page 50, Records of said Santa Cruz County, Arizona;

MINERAL No. 2, the location notice of which is recorded in Book 1 of Mining Locations, at page 74, Records of said Santa Cruz County, Arizona.

United States patents for all of said last mentioned mining claims being of record in the county recorder's office of the said county of Santa Cruz, State of Arizona; and personal property valued at $2,200.00, which is attached to and included in the assessment levied upon the "Excelsior West" patented mine. That the amount of taxes and interest due upon each of said patented mining claims, and said personal property, and the years for which the same [67] are due, up to the date hereof, are as follows:

Property	Year	Taxes	Int.
MINERAL WEST	1910	$ 16.00	$ 5.60
ALBERT	"	16.00	5.60
ALBERT No. 2	"	16.00	5.60

OAK	"	16.00	5.60
OPHIR No. 2	"	16.00	5.60
EXCELSIOR WEST	"	112.00	39.20
EXCELSIOR	"	16.00	5.60
HILLSIDE	"	16.00	5.60
BUENA VISTA	"	16.00	5.60
DONAU	"	16.00	5.60
GREAT EASTERN	"	16.00	5.60
RECORD	"	16.00	5.60
ALBION	"	16.00	5.60
STEINFELD	"	16.00	5.60
ALTO	"	128.00	44.80
ALTO EAST	"	16.00	5.60
GRAND PRIZE	"	16.00	5.60
OPHIR No. 1	"	16.00	5.60
MINERAL No. 1	"	16.00	5.60
MINERAL No. 2	"	16.00	5.60
STEINFELD WEST	"	16.00	5.60
MINERAL WEST	1911	22.40	5.15
ALBERT	"	22.40	5.15
ALBERT No. 2	"	22.40	5.15
OAK	"	22.40	5.15
OPHIR No. 2	"	18.42	4.23
EXCELSIOR WEST	"	141.60	32.57
EXCELSIOR	"	22.40	5.15
HILLSIDE	"	22.40	5.15
BUENA VISTA	"	14.17	3.26
DONAU	"	22.40	5.15
GREAT EASTERN	"	22.40	5.15
RECORD	"	22.40	5.15
ALBION	"	22.40	5.15
STEINFELD	"	22.40	5.15

STEINFELD WEST	"	22.40	5.15
ALTO	"	128.00	29.44
ALTO EAST	"	22.40	5.15
GRAND PRIZE	"	22.40	5.15
OPHIR No. 1	"	8.21	1.89
MINERAL No. 1	"	22.40	5.15
MINERAL No. 2	"	22.40	5.15
Carried Forward		$1,212.80	$344.19

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Carried Forward		$1,212.80	$344.19
MINERAL WEST	1912	28.00	3.08
ALBERT	"	28.00	3.08
ALBERT No. 2	"	28.00	3.08
OAK	"	28.00	3.08
OPHIR No. 2	"	23.02	2.53
EXCELSIOR WEST	"	87.00	9.57
EXCELSIOR	"	28.00	3.08
HILLSIDE	"	28.00	3.08
BUENA VISTA	"	17.71	1.95
DONAU	"	28.00	3.08
GREAT EASTERN	"	28.00	3.08
RECORD	"	28.00	3.08
ALBION	"	28.00	3.08
STEINFELD	"	28.00	3.08
STEINFELD WEST	"	28.00	3.08
ALTO	"	240.00	26.40
ALTO EAST	"	28.00	3.08
GRAND PRIZE	"	28.00	3.08
OPHIR No. 1	"	10.26	1.13

MINERAL No. 1	"	28.00	3.08
MINERAL No. 2	"	28.00	3.08
		$2,038.79	$435.05

That the amount of taxes and interest due upon all of the said above-described property, are as follows, to wit: Amount of taxes due, two thousand and thirty-eight and 79/100 ($2,038.79) dollars, and the amount of interest due, four hundred and thirty-five and 05/100 ($435.05) dollars. And it is further

ORDERED, ADJUDGED AND DECREED, that the plaintiff do have and recover of and from the said defendants the sum of two thousand four hundred and Seventy-three and 84/100 ($2,473.84) dollars, being the amount of taxes and interest due on the above and foregoing described property; that plaintiff do have and recover of and from the said defendants the further sum of one hundred and eight and 15/100 ($108.15) dollars, being the amount of clerk's fees and penalties on the said taxes, together with the additional sum of six hundred and fifty-four and 36/100 ($654.36) dollars, being costs of suit including attorney [69] fees, as provided by law, aggregating the total sum of three thousand two hundred and forty-one and 35/100 ($3,241.35) dollars, and also all accruing costs and interest; and that the lien of the State of Arizona be enforced, and all equities foreclosed upon the within and foregoing described property, and that said property or so much thereof as may

be necessary to satisfy this judgment, with all costs, interest and charges, be sold according to law.

LET EXECUTION ISSUE.

Done in open court this 5th day of December, A. D. 1913.

CARL G. KROOK,
Judge Presiding.

[Endorsed on back]: Judgment. Filed December 15, 1913. Edw. L. Mix, Clerk. Docketed. Recorded Book 1, Pages 152–3–4–5–6 and 7. [70]

State of Arizona,
County of Santa Cruz,—ss.

I, Edward L. Mix, Clerk of the Superior Court of the State of Arizona, in and for the county of Santa Cruz, do hereby certify that the within is a full, true and correct judgment-roll, as appears of record in the case of State of Arizona ex rel. Raymond R. Earhart, treasurer and *ex-officio* tax collector, Santa Cruz County, plaintiff, vs. The Alto Copper Company, a corporation, The Santa Cruz Mines & Smelter Company, a corporation, et al., defendants. No. 155.

WITNESS my hand and seal of the said Court at Nogales, this 15th day of December, A. D. 1913.

[Seal] EDW. L. MIX,
Clerk.

[Endorsed on back]: Judgement-roll. Filed December 15th, 1913. Edw. L. Mix, Clerk. [71]

In the Superior Court of the State of Arizona, in and for the County of Santa Cruz.

RAYMOND R. EARHART, Treasurer and *Ex-Officio* Tax Collector, in and for the County of Santa Cruz, Arizona,

Plaintiff,

vs.

THE ALTO COPPER COMPANY, a Corporation; The Santa Cruz Mines & Smelter Company, a Corporation; The Consolidated Mines, Smelter & Transportation Company, a Corporation; Alexander I. McLeod, L. J. Williams and Wilbur L. Davis, Constituting the Bondholders' Committee of the Said The Alto Copper Company and of the Said The Santa Cruz Mines & Smelter Company; the Santa Rita Company, a Corporation Organized Under the Laws of the State of New York, Arizona Copper Estate, a Corporation Organized Under the Laws of Arizona, James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisey Belle Bouldin, James E. Bouldin, J. E. Wise, and Lucia Wise, His Wife, and Albert Steinfeld, and Henry F. Guerin, Receiver,

Defendants.

RETURN OF SALE.

KNOW ALL MEN BY THESE PRESENTS, That I, W. S. McKnight, sheriff of Santa Cruz County, Arizona, do hereby certify that under and by virtue of the annexed judgment and execution issued out of and under the seal of the above-entitled court, and in the above-entitled cause, and to me as such sheriff, as aforesaid, duly directed and delivered on the 19 day of March, 1914, wherein and whereby I was commanded to sell the real estate and premises therein described, to satisfy the amount of the judgment filed and docketed in the above-entitled cause, and to me as on the 15 day of December, 1913, and which said judgment amounted to the sum of three thousand two hundred and forty-one and 35/100 Dollars together with costs amounting to four hundred and forty and 30/100 dollars, and together with interest thereon from said date until [72] paid, and all as set forth in said judgment and execution, and all costs and accruing costs and interest, including costs of sale;

That I duly levied upon all of the right, title and interest of the Alto Copper Company, a corporation, The Santa Cruz Mines & Smelter Company, a corporation, The Consolidated Mines, Smelter & Transportation Company, a corporation, Alexander I. McLeod, L. J. Williams and Wilbur L. Davis, constituting the Bondholders' Committee of the said The Alto Copper Company and of the said The Santa Cruz Mines & Smelter Company, The Santa Rita Company, a corporation organized

under the laws of the State of New York, Arizona Copper Estate, a corporation, organized under the laws of Arizona, James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisy Belle Bouldin, James E. Bouldin, Jane Doe Bouldin, J. E. Wise and Lucia Wise, his wife, and Albert Steinfeld and Henry F. Guerin, receivers, defendants, and each and all thereof, as the same existed at the dates of the attachment of the liens for the taxes included in said judgment, and as the same existed at the date of the rendition of said judgment and at the date of the levy of said execution and at any time since upon the property and real estate as follows, to wit:

Those certain lode mining claims situate in the Tyndall Mining District, Santa Cruz County, Arizona, known as the Alto Group of Mines, to wit:

Mineral West, the location notice of which is recorded in Book 1 of Mining Locations, page 76;

Albert, the location notice of which is recorded in Book 1 of Mining Locations, page 58;

Albert No. 2, the location notice of which is recorded in Book 1 of Mining Locations, page 73;

The Oak, the location notice of which is recorded in Book 1 of Mining Locations, page 52;

Ophir No. 1, the location notice of which is recorded in Book 5 of Mining Locations, page 188;

Ophir No. 2, the location notice of which is recorded in Book 5 of Mining Locations, page 189;

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Excelsior West, the location notice of which is recorded in Book 1, Mining Locations, page 93;

Excelsior, the location notice of which is recorded in Book 1 of Mining Locations, page 85;

Hillside, the location notice of which is recorded in Book 2 of Mining Locations, page 160;

Buena Vista, the location notice of which is recorded in Book 1 of Mining locations, page 86;

Donau, the location notice of which is recorded in Book 1 of Mining locations, page 88;

Great Eastern, the location notice of which is recorded in Book 2 of Mining Locations, page 162;

Record, the location notice of which is recorded in Book 5 of Mining Locations, page 191;

Albion, the location notice of which is recorded in Book 1 of Mining Locations, page 54;

Steinfeld, the location notice of which is recorded in Book 1 of Mining Locations, page 56;

Steinfeld West, the location notice of which is recorded in Book 1 of Mining Locations, page 80;

Alto, the location notice of which is recorded in Book 1 of Mining Locations, page 81;

Alto East, the location notice of which is recorded in Book 1 of Mining Locations, page 82;

Grand Prize, the location notice of which is recorded in Book 1 of Mining Locations at page 84;

Mineral No. 1, the location notice of which is recorded in Book 1 of Mining Locations, at page 50;

Mineral No. 2, the location notice of which is recorded in Book 1 of Mining Locations, page 74.

The foregoing descriptions should be construed

as follows: book and page of mining locations, in the office of the county recorder of the said county of Santa Cruz, Arizona. Application for United States Patent has been made upon each and all of the hereinabove described mines and mining claims, and final receipt has issued, but the patents have as yet not been issued;

Together with all and singular the rights and appurtenances thereto and therein, or in otherwise appertaining or belonging;

That I made said levy by filing a copy of said judgment and said execution with the levy endorsed thereon and the description [74] of the property, in the office of the county recorder of the said county of Santa Cruz, and advertised said sale according to law in the "Oasis," a newspaper published weekly in the city of Nogales, said county, for more than twenty-one days prior to the date fixed for sale, according to the certificate of the foreman, Michael Behan, of said newspaper hereto attached and by reference made a part hereof, and the notice of said sale was posted by me in three public places in the county of Santa Cruz, one of which places was at the courthouse door of the courthouse of said county for more than three weeks before the date of said sale, and all as required by law; that said sale was originally noticed to take place on the 21st day of April, 1914, at the hour of eleven o'clock in the forenoon and at the West door of the courthouse of the said county of Santa Cruz; that at said time I attended at said place, and for good and sufficient cause duly post-

poned said sale until the 22d day of June, 1914, at the hour of eleven o'clock in the forenoon; that on the 22d day of June, 1914, I attended at said place and time and for good and sufficient cause duly postponed said sale until the 29th day of June, 1914, at the hour of eleven o'clock in the forenoon at the same place. That I duly noted upon the posted notices of said sale the said respective adjournments and that the publication of said notice of sale was duly continued and each postponement duly noted in said publication; that in pursuance to said judgment and execution and notice of sale I attended said sale at the hour of eleven o'clock in the forenoon on the 29th day of June, 1914, at the West door of the courthouse of the said county of Santa Cruz, in the city of Nogales, and did there and then offer this property for sale, first offering the same in separate lots or parcels, and that I did sell said property in manner following to Samuel F. Noon, he being the best and highest bidder for same, that is to say that I did sell to the said Samuel F. Noon the Mineral West, the location notice of which is recorded in Book 1 of Mining Locations, at page 76, records of Santa Cruz County, Arizona, for the sum and price of fifty dollars, gold coin of the United States.

ALBERT No. 2, the location notice of which is recorded in [75] Book 1 of mining locations at page 73, records of Santa Cruz County, Arizona, for the sum and price of fifty dollars, gold coin of the United States.

ALBERT, the location notice of which is recorded in Book 1 of Mining Locations at page 58, records of Santa Cruz County, Arizona, for the sum and price of fifty dollars, gold coin of the United States.

STEINFELD WEST, the location notice of which is recorded in Book 1 of Mining Locations at page 80, records of Santa Cruz County, Arizona, for the sum and price of twenty-five dollars, gold coin of the United States.

OPHIR No. 2, the location notice of which is recorded in Book 5 of Mining Locations at page 189, records of Santa Cruz County, Arizona, for the sum and price of twenty-five dollars, gold coin of the United States.

OPHIR No. 1, the location notice of which is recorded in Book 5 of Mining Locations at page 188, records of Santa Cruz County, Arizona, for the sum and price of twenty-five dollars, gold coin of the United States.

BUENA VISTA, the location notice of which is recorded in Book 1 of Mining Locations at page 86, records of Santa Cruz County, Arizona, for the sum and price of twenty-five dollars, gold coin of the United States.

DONAU, the location notice of which is recorded in Book 1 of Mining Locations at page 88, records of Santa Cruz County, Arizona, for the sum and price of twenty-five dollars, gold coin of the United States.

GREAT EASTERN, the location notice of which is recorded in Book 2 of Mining Locations at page

162, records of Santa Cruz County, Arizona, for the sum and price of twenty-five dollars, gold coin of the United States.

GRAND PRIZE, the location notice of which is recorded in Book 1 of Mining Locations at page 84, records of Santa Cruz County, Arizona, for the sum and price of twenty-five dollars, gold coin of the United States.

RECORD, the location notice of which is recorded in Book 5 of Mining Locations at page 191, records of Santa Cruz County, Arizona, for the sum and price of twenty-five dollars, gold coin of the United States.

HILLSIDE, the location notice of which is recorded in Book 2 of Mining Locations at page 160, records of Santa Cruz County, Arizona, for the sum and price of twenty-five dollars, gold coin of the United States.

ALTO, the location notice of which is recorded in Book 1 of Mining Locations at page 81, records of Santa Cruz County, Arizona, for the sum and price of One Thousand Dollars, gold coin of the United States.

That after selling the above, I continued to offer the said property in parcels until I had offered the whole thereof, and did receive no bid for the same;

That thereupon I offered all of the remainder of said property not [76] sold as aforesaid, to wit:

OAK, the location notice of which is recorded in Book 1, of Mining Locations, at page 52; EXCELSIOR WEST, the location notice of which is re-

corded in Book 1 of mining locations at page 93; EXCELSIOR, the location notice of which is recorded in Book 1 of Mining Locations at page 85; ALBION, the location notice of which is recorded in Book 1 of Mining Locations at page 54; STEINFELD, the location notice of which is recorded in Book 1 of Mining Locations at page 56; ALTO EAST, the location notice of which is recorded in Book 1 of Mining Locations at page 82; MINERAL No. 1, the location notice of which is recorded in Book 1 of Mining Locations at page 50; and MINERAL No. 2, the location notice of which is recorded in Book 1 of Mining Locations at page 74, all of said records being records of Santa Cruz County, Arizona, for the sum and price of two thousand three hundred and sixteen dollars and sixty-five cents ($2316.65), in one lot and sold the same to the said Samuel F. *B*oon, he being the highest and best bidder for same, for the sum of two thousand three hundred and sixteen and 65/100 dollars cash, making a total amount received from the sale of all of said properties from the sale to Samuel F. Noon, of three thousand six hundred and ninety-one and 65/100 dollars; that the said Samuel F. Noon has paid to me in lawful money the said sum of three thousand six hundred and ninety-one and 65/100 Dollars, and I have issued and delivered to him a certificate of sale of said property, and have filed a copy thereof in the office of the recorder of the said county of Santa Cruz; that I return this execution fully satisfied.

Dated this 29th day of June, 1914.

W. S. McKNIGHT,
Sheriff of Santa Cruz County, Arizona.
By I. Burgoon,
Deputy. [77]

AFFIDAVIT OF PUBLICATION.

State of Arizona,
County of Santa Cruz,—ss.

Michael Behan, being duly sworn, affirms that he is foreman the "Oasis," a weekly newspaper, published at Nogales, Santa Cruz County, State of Arizona, and that the annexed notice or advertisement was published in said newspaper once in each week for 14 consecutive weeks, to wit: Notice by sheriff, execution, State of Arizona, at relation and use of R. R. Earhart, etc., vs. Alto Copper Company et al., the first publication being March 28th, 1914, and continued during the entire period of publication in each and every issue of said newspaper, and not in a supplement thereof, and the last publication being on June 27th, 1914, with notice of postponement as appears.

MICHAEL BEHAN,
Foreman of the "Oasis."

State of Arizona,
County of Santa Cruz,—ss.

Personally appeared before me, Allen T. Bird, notary public in and for Santa Cruz County, State of Arizona, this 27th day of June, A. D. 1914, Michael Behan, foreman of the "Oasis," who being

duly sworn, deposes and says that the allegations set forth above are true.

[Seal] ALLEN T. BIRD,
Notary Public.

[Endorsed on back]: State of Arizona $112.00.
[78]

(Notice or advertisement as it appeared in the "Oasis," the weekly newspaper published in Nogales, Santa Cruz County, Arizona.)

In the Superior Court of the County of Santa Cruz, State of Arizona.

No. 156.

STATE OF ARIZONA, at the Relation and to the Use of RAYMOND R. EARHART, Treasurer and *Ex-Officio* Tax Collector of Santa Cruz County in the State of Arizona,
Plaintiff,

vs.

THE ALTO COPPER COMPANY, a Corporation, The Santa Cruz Mines and Smelter Company, a Corporation, The Consolidated Mines, Smelter and Transportation Company, a Corporation, Alexander I. McLeod, L. J. Williams and Wilbur L. Davis, Constituting the Bondholders' Committee of the said The Alto Copper Company and the said The Santa Cruz Mines and Smelter Company; The Santa Rita Company, a Corporation Organized Under the Laws of the State of New York;

Arizona Copper Estate, a Corporation Organized Under the Laws of Arizona; James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisy Belle Bouldin, James E. Bouldin, Jane Doe Bouldin, J. E. Wise and Lucia Wise, His Wife, and Albert Steinfeld and Henry F. Guerin, Receivers,

Defendants.

NOTICE OF SALE BY SHERIFF.

Under and by virtue of an execution issued out of the Superior Court of the State of Arizona, in and for the county of Santa Cruz, on the 19th day of March, 1914, in the above-entitled action, wherein the State of Arizona, at the relation and to the use of Raymond R. Earhart, treasurer and *ex-officio* tax collector of Santa Cruz County in the State of Arizona, plaintiff, obtained a judgment against the Alto Copper Company, a corporation, The Santa Cruz Mines & Smelter Company, a corporation, the Consolidated Mines, Smelter and Transportation Company, a corporation, and Alexander I. McLeod, L. J. Williams and Wilbur L. Davis, constituting the Bondholders' Committee of the said The Alto Copper Company and the said The Santa Cruz Mines and Smelter Company, the Santa Rita Company, a corporation, Arizona Copper Estate, a corporation, James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisy Belle Bouldin, James E. Bouldin, Jane Doe Bouldin, J. E. Wise and Lucia Wise, his wife, and

Albert Steinfeld, and Henry F. Guerin as receivers of said corporations, and said committee, the above defendants and each and all thereof, on the [79] 5th day of December, 1913, for the sum of $3,241.35, together with interest on the sum of $2038.79 thereof, from date, at the rate of twelve per cent per annum from said date until paid and upon the remainder of said judgment at the rate of six per cent per annum from said date until paid, and costs at the date of said judgment taxed at the sum of $——, and accruing costs, and which said judgment was duly entered and recorded on the 15th day of December, 1913, in the judgment book of docket of said court, I am commanded to sell, and have this day levied upon all of the right, title, interest, claim, demand and property of the said defendants, and each and all thereof, and as the same existed at the time of the rendition and entry of said judgment as aforesaid, or any subsequent date, and now, in and to the following described property, to wit:

Those certain United States patented mines or mining claims situate in the Tyndall Mining District, Santa Cruz County, State of Arizona, known as the "Alto Group," to wit:

MINERAL WEST, the location notice of which is recorded in Book 1 of Mining Locations, at page 76;

ALBERT, the location notice of which is recorded in Book 1 of Mining Locations at page 58;

ALBERT No. 2, the location notice of which is recorded in Book 1 of Mining Locations, at page 73;

OAK, the location notice of which is recorded in Book 1 of Mining Locations at page 52;

OPHIR No. 1, the location notice of which is recorded in Book 5 of Mining Locations at page 188;

OPHIR No. 2, the location notice of which is recorded in Book 5 of Mining Locations at page 189;

EXCELSIOR WEST, the location notice of which is recorded in Book 1 of Mining Locations at page 93;

EXCELSIOR, the location notice of which is recorded in Book 1 of Mining Locations at page 85;

HILLSIDE, the location notice of which is recorded in Book 2 of Mining Locations at page 160;

BUENA VISTA, the location notice of which is recorded in Book 1 of Mining Locations at page 86;

DONAU, the location notice of which is recorded in Book 1 of Mining Locations at page 88;

GREAT EASTERN, the location notice of which is recorded in Book 2 of Mining Locations at page 162; [80]

RECORD, the location notice of which is recorded in Book 5 of Mining Locations at page 191;

ALBIAN, the location notice of which is recorded in Book 1 of Mining Locations at page 54;

STEINFELD, the location notice of which is recorded in Book 1 of Mining Locations at page 56;

STEINFELD WEST, the location notice of which is recorded in Book 1 of Mining Locations at page 80;

ALTO, the location notice of which is recorded in Book 1 of Mining Locations at page 81;

ALTO EAST, the location notice of which is recorded in Book 1 of Mining Locations at page 82;

GRAND PRIZE, the location notice of which is recorded in Book 1 of Mining Locations at page 84;

MINERAL No. 1, the location notice of which is recorded in Book 1 of Mining Locations at page 50;

MINERAL No. 2, the location notice of which is recorded in Book 1 of Mining Locations at page 74;

The foregoing descriptions should be construed as follows:

Book and page of mining locations in the office of the county recorder of the said county of Santa Cruz, Arizona.

Applications for United States Patents have been made upon each and all of the hereinabove described mines and mining claims, and final receipt has issued but the patents have as yet not been issued.

PUBLIC NOTICE IS HEREBY GIVEN, that on Tuesday, the 21st day of April, A. D. 1914, at eleven o'clock in the forenoon of that day, in front of the courthouse door of the county of Santa Cruz, Arizona, I will in obedience to said execution, sell the above described property, or so much thereof as may be necessary to satisfy said judgment, interest and costs to the highest bidder for cash.

Dated this 19th day of March, A. D. 1914.

W. S. McKNIGHT,
Sheriff of Santa Cruz County, Arizona.
By I. Burgoon,
Deputy.

First publication March 28th, 1914.
Last publication April 18, 1914. [81]

POSTPONEMENT No. 1.

Notice is hereby given that the above advertised sale has been postponed until Monday, June 22d, 1914, at the same hour of that day, and at the same place as specified in the foregoing notice.

W. S. McKNIGHT,
Sheriff.
By I. Burgoon,
Deputy Sheriff.

Dated at Nogales, Arizona, April 1, 1914.

POSTPONEMENT No. 2.

Notice is hereby given that the above advertised sale is postponed further until Monday, June 29, 1914, at the same hour of the day and the same place specified in the original notice of sale.

W. S. McKNIGHT,
Sheriff.
By I. Burgoon,
Deputy Sheriff.

Dated at Nogales, Arizona, June 22, 1914. [82]

In the Superior Court of the County of Santa Cruz, State of Arizona.

No. 155.

STATE OF ARIZONA, at the Relation and to the Use of RAYMOND R. EARHART, Treasurer and *Ex-Officio* Tax Collector of Santa Cruz County in the State of Arizona,
Plaintiffs,

vs.

THE ALTO COPPER COMPANY, a Corporation, The Santa Cruz Mines and Smelter Company,

a Corporation, The Consolidated Mines, Smelter and Transportation Company, a Corporation, Alexander I. McLeod, L. J. Williams and Wilbur L. Davis, Constituting the Bondholders' Committee of the said The Alto Copper Company, and the said The Santa Cruz Mines and Smelter Company; the Santa Rita Company, a Corporation Organized Under the Laws of the State of New York, Arizona Copper Estate, a Corporation Organized Under the Laws of Arizona; James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisy Belle Bouldin, James E. Bouldin, Jane Doe Bouldin, J. E. Wise, and Lucia Wise, His Wife, and Albert Steinfeld and Henry F. Guerin, Receivers,

Defendants.

EXECUTION.

The State of Arizona, to the Sheriff of the County of Santa Cruz, GREETING:

WHEREAS, on the 5th day of December, A. D. 1913, the State of Arizona, at the relation and to the use of Raymond R. Earhart treasurer and *ex-officio* tax collector, in and for the county of Santa Cruz, State of Arizona, plaintiff, recovered a judgment in the Superior Court of the State of Arizona, in and for the county of Santa Cruz, against the Alto Copper Company, a corporation, The Santa Cruz Mines and Smelter Company, a corporation, The Consolidated Mines, Smelter and

Transportation Company, a corporation, Alexander I. McLeod, L. J. Williams, and Wilbur L. Davis, constituting the Bondholders' Committee of the said The Alto Copper Company, and the said The Santa Cruz Mines and Smelter Company, The Santa Rita Company, Arizona Copper Estate, a corporation, James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe [83] Watts, Dabney C. T. Davis, Jane Doe Davis, Daisy Belle Bouldin, James E. Bouldin, Jane Doe Bouldin, J. E. Wise, Lucia Wise, and Albert Steinfeld and Henry F. Guerin, receivers, for the sum of $3,241.35, together with interest on the sum of $2038.79 thereof, from date, at the rate of twelve per cent per annum until paid, and upon the remainder of said judgment at the rate of six per cent per annum from said date until paid, and costs at the date of said judgment, taxed at the sum of $——, and accruing costs, and also a decree foreclosing the lien of the said State of Arizona, for taxes upon all the property in said judgment set forth and described, and hereinafter fully set forth and described, to wit:

The following patented mines situate in the Tyndall Mining District, Santa Cruz County, State of Arizona, known as the "Alto Group," viz.:

MINERAL WEST, the location notice of which is recorded in book 1 of mining locations, at page 76, records of Santa Cruz County, Arizona;

ALBERT, the location notice of which is recorded in book 1 of mining locations at page 76, records of Santa Cruz County, Arizona;

ALBERT No. 2, the location notice of which is recorded in book 1 of mining locations at page 73, records of Santa Cruz County, Arizona;

OAK, the location notice of which is recorded in book 1 of mining locations, at page 52, records of Santa Cruz County, Arizona;

OPHIR No. 1, the location notice of which is recorded in book 5 of mining locations, at page 188, records of Santa Cruz County, Arizona;

OPHIR No. 2, the location notice of which is recorded in book 5 of mining locations at page 189, records of Santa Cruz County, Arizona;

EXCELSIOR WEST, the location notice of which is recorded in book 1 of mining locations at page 93, records of Santa Cruz County, Arizona;

EXCELSIOR, the location notice of which is recorded in book 1 of mining locations at page 85, records of Santa Cruz County, Arizona;

HILLSIDE, the location notice of which is recorded in book 2 of mining locations at page 160, records of Santa Cruz County, Arizona;

BUENA VISTA, the location notice of which is recorded [84] in book 1 of mining locations, at page 86, records of Santa Cruz County, Arizona;

DONAU, the location notice of which is recorded in book 1 of mining locations at page 88, records of Santa Cruz County, Arizona;

GREAT EASTERN, the location notice of which is recorded in book 2 of mining locations at page 162, records of Santa Cruz County, Arizona;

RECORD, the location notice of which is recorded

in book 5 of mining locations at page 191, records of Santa Cruz County, Arizona;

ALBION, the location notice of which is recorded in book 1 of mining locations at page 54, records of Santa Cruz County, Arizona;

STEINFELD, the location notice of which is recorded in book 1 of mining locations at page 56, records of Santa Cruz County, Arizona;

STEINFELD WEST, the location notice of which is recorded in book 1 of mining locations at page 80, records of Santa Cruz County, Arizona;

ALTO, the location notice of which is recorded in book 1 of mining locations at page 81, records of Santa Cruz County, Arizona;

ALTO EAST, the location notice of which is recorded in book 1 of mining locations at page 82, records of Santa Cruz County, Arizona;

GRAND PRIZE, the location notice of which is recorded in book 1 of mining locations at page 84, records of Santa Cruz County, Arizona;

MINERAL No. 1, the location notice of which is recorded in book 1 of mining locations at page 50, records of Santa Cruz County, Arizona;

MINERAL No. 2, the location notice of which is recorded in book 1 of mining locations at page 74, records of Santa Cruz County, Arizona.

The foregoing description should be construed as follows: Book and page of mining locations in the office of the county recorder of the said county of Santa Cruz, Arizona. Application for United States Patents has been made upon each and all of the hereinabove described mines and mining claims,

and final receipt has issued, but the patents have as yet not been issued.

Also all personal property which was attached to and included in the assessment levied upon the "Excelsior West" patented mine;

All as appears to us of record and a copy of which judgment and decree is hereto annexed and made a part hereof; and

WHEREAS, the judgment-roll in the action in which said judgment is rendered is filed in the clerk's office in said court in the said [85] county of Santa Cruz, and the said judgment was docketed in the said clerk's office in the said county, on the 15th day of December, 1913, and the said sum of $3,241.35 together with interest, as aforesaid, and together with plaintiff's costs amounting to the sum of $——, is now at the date of this writ actually due on said judgment, and said foreclosure of said lien and order of sale.

NOW, YOU THE SAID SHERIFF ARE HEREBY REQUIRED AND COMMANDED to levy upon, advertise and sell the hereinabove described property or so much thereof as may be necessary to pay said judgment and subsequent costs and interest, the same as you might do under ordinary execution, and make return of this writ within sixty days after your receipt hereof, with what you have done endorsed hereon.

WITNESS, Hon. W. A. O'CONNOR, Judge of the Superior Court of the State of Arizona, in and for the county of Santa Cruz, at the courthouse of said

county of Santa Cruz, this 19th day of March, A. D. 1914.

ATTEST, my hand and the seal of said Court the day and year last above written.

[Seal] EDW. L. MIX,
Clerk of Said Superior Court.

[Endorsed on back]: Writ of Execution. Filed July 9, 1914. Edw. L. Mix, Clerk. [86]

State of Arizona,
County of Santa Cruz,—ss.

I, Edward L. Mix, clerk of the Superior Court of the State of Arizona, in and for the county of Santa Cruz, do hereby certify that the foregoing is a full, true and correct copy of the judgment-roll, the execution and sale and of the entire record in Case No. 155, entitled State of Arizona ex rel., etc., plaintiff, vs. The Alto Copper Company, a Corporation, et al., defendants, as the same appears of record and on file in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Superior Court at Nogales, Arizona, this 20th day of February, 1918.

[Seal] EDW. L. MIX,
Clerk Superior Court.
By Laura C. Mix,
Deputy Clerk.

[Endorsed on back]: Pltfs. Exhibit 4. Marked for Identification Nov. 4th, 1919. "Certified Copy of Record." [87]

Defendants' Exhibit No. 1.

$2.50 I. R. Stamps Cancelled.
"2/5/16. W. S. McK., Shff."

THIS INDENTURE made the 5th day of February, in the year of our Lord nineteen hundred and sixteen (1916), between WILLIAM S. McKNIGHT, as Sheriff of the County of Santa Cruz, State of Arizona, party of the first part, and ALTO MINES COMPANY, a corporation duly organized and existing under the laws of the State of Arizona, party of the second part, WITNESSETH:

WHEREAS a certain final judgment or decree was duly made and entered in and by the Superior Court of the County of Santa Cruz, State of Arizona, on December 5, 1913, and being cause No. 156 in said Court, in which action the State of Arizona at the relation and to the use of Raymond R. Earhart, Treasurer and *ex-officio* Tax Collector in and for the County of Santa Cruz, State of Arizona, was plaintiff, and The Alto Copper Company, a corporation, The Santa Cruz Mines and Smelter Company, a corporation, The Consolidated Mines, Smelter and Transportation Company, a corporation, Alexander I. McLeod, L. J. Williams and Wilbur L. Davis, constituting the Bondholders' Committee of the said The Alto Copper Company and the said The Santa Cruz Mines and Smelter Company; the Santa Rita Company, a corporation organized under the laws of the State of New York; Arizona Copper Estate, a corporation organized under the laws of Arizona; James W. Vroom, Jane

Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisy Belle Bouldin, James E. Bouldin, Jane Doe Bouldin, J. E. Wise, and Lucia Wise, his wife, and Albert Steinfeld and Henry F. Guerin, as Receivers, were defendant, wherein and whereby the lien of the State of Arizona for certain taxes was directed to be enforced and [88] all equities foreclosed against the property specified in said judgment, and that said property or so much thereof as may be necessary to satisfy the judgment, with all costs, interest and charges be sold according to law, and which judgment then and there was fixed and liquidated at the sum of Three thousand two hundred forty-one 31/100 Dollars; and

WHEREAS said judgment was duly certified to the party hereto of the first part under the seal of said Court on March 19, 1914, and a writ of execution directed to such sheriff was duly issued, directed and delivered whereby he was commanded to sell the property described in said judgment according to law, and to apply the proceeds of such sale towards the indebtedness on said judgment or decree in said action which, with subsequent interest and costs amounted in all on June 29, 1914, to the sum of Three thousand six hundred eighty-one 65/100 Dollars, and

WHEREAS the said sheriff did on the 29th day of June, 1914, at eleven o'clock in the forenoon, after due public notice had been given as required by the laws of the State of Arizona and the course

and practice of said Superior Court, did duly sell at public auction at the west door of the County Court House at Nogales, in said County of Santa Cruz, agreeably to the said judgment and decree and writ aforesaid and the provisions of law, the premises in said judgment mentioned, at which sale the premises in said judgment or decree were fairly struck off to Samuel F. Noon for the sum of Three Thousand six hundred eighty-one 65/100 Dollars, that being the highest sum bid therefor, as set forth in the certificate of sale as hereinafter set forth, which sum was thereupon paid to the sheriff by the said Samuel F. Noon in gold coin of the United States; and

WHEREAS said sheriff thereupon made and issued [89] the usual certificate in duplicate of the said sale in due form of law and delivered one thereof to the said purchaser, and caused the other to be filed in the office of the County Recorder in said County of Santa Cruz; and

WHEREAS more than nineteen months have elapsed since the date of said sale, and no redemption (if any right thereto existed) has been made of the said premises so sold as aforesaid by or on behalf of the judgment debtors or any of them, or by or on behalf of any other person whatsoever, and

WHEREAS by deed dated June 29, 1914, and recorded in the office of the Recorder of Santa Cruz County on January 8, 1915, in Book 6 M. D. pages 120 to 122, the said Samuel F. Noon and Natalie F. Noon, his wife, did convey to the party hereto

of the second part all that certain part of the premises so sold as aforesaid as is hereinafter more particularly described; and did expressly authorize and direct the sheriff of Santa Cruz County in and by said deed to execute thereunder to the party hereto of the second part any and all conveyances of the property hereinafter described;

NOW THEREFORE, in consideration of the premises and in order to carry into effect the said sale so made by the said sheriff in pursuance to said judgment or decree and writ of execution, the said party hereto of the first part has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said Alto Mines Company, its successors and assigns forever, all those certain mines, mining claims, mining properties and the land covered thereby, situate, lying and being in the Tyndall Mining District, County of Santa Cruz, State of Arizona, as follows, to wit:

OPHIR No. 2, the location notice of which is [90] recorded in Book 5 of Mining Locations at page 189;

OPHIR No. 1, the location notice of which is recorded in Book 5 of Mining Locations, at page 188;

EXCELSIOR, the location notice of which is recorded in Book 1 of Mining Locations, at page 85;

EXCELSIOR WEST, the location notice of which is recorded in Book 1 of Mining Locations, at page 93;

BUENA VISTA, the location notice of which is

recorded in Book 1 of Mining Locations, at page 86;

HILLSIDE, the location notice of which is recorded in Book 2 of Mining Locations at page 160;

DONAU, the location notice of which is recorded in Book 1 of Mining Locations at page 88;

GREAT EASTERN, the location notice of which is recorded in Book 2 of Mining Locations, at page 162;

GRAND PRIZE, the location notice of which is recorded in Book 1 of Mining Locations, at page 84;

ALTO EAST, the location notice of which is recorded in Book 1 of Mining Locations, at page 82.

Also all that part and parcel of the STEINFELD WEST, ALBERT, STEINFELD, ALTO, ALBIAN and RECORD, which lies south of the north boundary of the Baca Float No. 3, as selected on June 17th, 1863, under and pursuant to an act of Congress approved June 21st, 1860, as said line is now fixed and established by the survey of Philip Contzen, Deputy Mineral Survey, made in the year 1905.

The location notices of said respective claims last mentioned, are recorded as follows: STEINFELD WEST, the location notice of which is recorded in Book 1 of Mining Locations, at page 80; ALBERT, the location notice of which is recorded in Book 1 of Mining Locations, at page 58; STEINFELD, the location notice of which is recorded in Book 1 of Mining Locations at page 56; ALTO, the location notice of which is recorded in Book 1 of

Mining Locations, at page 81; ALBIAN, the location notice of which is recorded in Book 1 of Mining Locations, at page 54; and the RECORD, the location notice of which is recorded in Book 5 of Mining Locations at page 191. The book and page references hereinabove made, are to the books in the County Recorder's office of Santa Cruz County.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the rents, issues and profits thereof. [91]

TO HAVE AND TO HOLD all and singular the said premises hereby conveyed, or intended so to be, together with the appurtenances unto the said party of the second part, its successors and assigns, forever.

IN WITNESS WHEREOF the party of the first part as sheriff as aforesaid has hereunto set his hand and seal the day and year first above written.

W. S. McKNIGHT,
Sheriff of Santa Cruz County, State of Arizona.
By O. H. Walker,
Deputy Sheriff.

State of Arizona,
County of Santa Cruz,—ss.

This instrument was acknowledged before me this 5th day of February, 1916, by William S. McKnight, as Sheriff of the county of Santa Cruz.

[Seal] S. F. NOON,
Notary Public in and for the County of Santa Cruz, State of Arizona.

(10c. I. R. Stamps Canc.)

State of Arizona,
County of Santa Cruz,—ss.

This instrument was acknowledged before me the fifth day of February, 1916, by O. H. Walker, as Deputy Sheriff of said Santa Cruz County, as such deputy sheriff and for William S. McKnight, as Sheriff of said county.

WITNESS my hand and official seal this 11th day of February, 1916.

[Seal] S. F. NOON,
Notary Public in and for the County of Santa Cruz, State of Arizona.

(10¢ I. R. Stamps Canc.)

[Endorsed]: Original Deed. Defts. Exhibit 1, Marked for Identification. Nov. 4th, 1919. [92]

Defendants' Exhibit No. 3.

THIS INDENTURE, made and entered into this 29th day of June, A. D. 1914, by and between SAMUEL F. NOON and NATALIE F. NOON, his wife, both of Nogales, Santa Cruz County, State of Arizona, parties of the first part, and the ALTO MINES COMPANY, a corporation organized and existing under the laws of the State of Arizona, party of the second part, WITNESSETH:

That the said parties of the first part for and in consideration of the sum of Ten Dollars, lawful money of the United States, and other good and valuable considerations, have bargained, sold, conveyed and quit-claimed, and by these presents do

bargain, sell, convey and quit-claim unto the said party of the second part, all ~~that~~ (those, interlined and initials E. L. M. in margin) certain mineing claims, (interlined and initialed E. L. M. in margin) or mines located and mining property situate in the Tyndall Mining District, County of Santa Cruz, State of Arizona, as follows, to wit:

OPHIR No. 2, the location notice of which is recorded in Book 5 of Mining Locations at page 189.

OPHIR No. 1, the location notice of which is recorded in Book 5 of Mining Locations, at page 188.

EXCELSIOR, the location notice of which is recorded in Book 1 of Mining Locations, at page 85.

EXCELSIOR WEST, the location notice of which is recorded in Book 1 of Mining Locations, at page 93.

BUENA VISTA, the location notice of which is recorded in Book 1 of Mining Locations, at page 86.

HILLSIDE, the location notice of which is recorded in Book 2 of Mining Locations, at page 160.

DONAU, the location notice of which is recorded in Book 1 of Mining Locations, at page 88.

GREAT EASTERN, the location notice of which is recorded in Book 2 of Mining Locations, at page 162.

GRAND PRIZE (Prize originally spelled "Price," but corrected to Prize, and initialed E. L. M. in the margin), the location notice of which is recorded in Book 1 of Mining Locations, at page 84.

ALTO EAST, the location notice of which is recorded in Book 1 of Mining Locations, at page 82.

Also all that part and parcel of the STEINFELD WEST, ALBERT, STEINFELD, ALTO, ALBIAN and RECORD, which lies south of the north boundary line of Baca Float No. 3, as selected on June 17th, 1863, under and pursuant to an act of Congress approved June 21st, 1860, as said line is now fixed and established by the survey of Philip Contzen (Spelling of name "Contzen" corrected in ink and initialed E. L. M. in margin), Deputy Mineral Surveyor, made in the year 1905.

The location notices of said respective claims last mentioned, are recorded as follows: STEINFELD WEST, the location notice of which is recorded in Book 1 of Mining Locations, at page 80; ALBERT, the location notice of which is recorded in Book 1 of Mining Locations at page 58; STEINFELD, the location notice of which is recorded in Book 1 of Mining Locations at page 56; ALTO, the location notice of which is recorded in Book 1 of Mining [93] Locations, at page 81; ALBIAN, the location notice of which is recorded in Book 1 of Mining Locations, at page 54, and the RECORD, the location notice of which is recorded in Book 5 of Mining Locations, at page 191. The book and page references hereinabove made, are to the books in the County Recorder's office of Santa Cruz County.

TO HAVE AND TO HOLD the same unto the said party of the second part, its successors and assigns forever.

And we hereby expressly authorize and direct the Sheriff of said County of Santa Cruz, State of Arizona, to execute direct to the said party of the second part hereto, any and all conveyances of the above-described property, to which we are now or may become entitled.

IN WITNESS WHEREOF, the parties of the first part hereto have hereunto set their hands and seals the day and year first above written.

SAMUEL F. NOON. (L. S.)
NATALIE F. NOON. (L. S.)

Witness as to signatures:
C. E. BARDWELL.

State of Arizona,
County of Santa Cruz,—ss.

Before me, Clerk of the Superior Court, in and for the county of Santa Cruz, State of Arizona, personally appeared Samuel F. Noon and Natalie F. Noon, to me known and known to me to be the individuals described in and who executed the foregoing instrument, and duly severally acknowledged before me that they executed the same.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of office this 29th day of June, A. D. 1914.

[Seal] EDW. L. MIX,
Clerk Superior Court.

[Endorsed]: Deed. Defts. Exhibit 3 for Identification. Nov. 4th, 1919. [94]

Defendants' Exhibit No. 4.

In the Superior Court of the County of Santa Cruz, State of Arizona.

No. 155.

STATE OF ARIZONA, at the Relation and to the Use of RAYMOND R. EARHART, Treasurer and *Ex-Officio* Tax Collector of Santa Cruz County in the State of Arizona,

Plaintiff,

vs.

THE ALTO COPPER COMPANY, a Corporation, The Santa Cruz Mines and Smelter Company, a Corporation, The Consolidated Mines, Smelter and Transportation Company, a Corporation, Alexander I. McLeod, L. J. Williams and Wilbur L. Davis, Constituting the Bondholders' Committee of the said The Alto Copper Company and the said The Santa Cruz Mines and Smelter Company; The Santa Rita Company, a Corporation, Organized Under the Laws of the State of New York; Arizona Copper Estate, a Corporation Organized Under the Laws of Arizona, James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisy Belle Bouldin, James E. Bouldin, Jane Doe Bouldin, J. E. Wise and Lucia Wise, his Wife, and Albert Steinfeld and Henry F. Guerin, Receivers,

Defendants.

EXECUTION.

THE STATE OF ARIZONA, to the Sheriff of the County of Santa Cruz, GREETINGS:

WHEREAS, on the 5th day of December, A. D. 1913, the State of Arizona, at the relation and to the use of Raymond R. Earhart, Treasurer and *ex-officio* Tax Collector in and for the County of Santa Cruz, State of Arizona, plaintiff, recovered a judgment in the Superior Court of the State of Arizona in and for the County of Santa Cruz, against the Alto Copper Company, a corporation. The Santa Cruz Mines and Smelter Company, a corporation, The Consolidated Mines Smelter and Transportation Company, a corporation, Alexander I. McLeod, L. J. Williams and Wilbur L. Davis, constituting the Bondholders' Committee of the said The Alto Copper Company and the said The Santa Cruz Mines and Smelter Company, The Santa Rita Company, a corporation, Arizona Copper Estate, a corporation, James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisy Belle Bouldin, James E. Bouldin, Jane Doe Bouldin, J. E. Wise, Lucia Wise, and Albert Steinfeld and Henry F. Guerin, Receivers, for the sum of $3,241.35, together with interest on the sum of $2038.79 thereof, from date, at the rate of twelve per cent per annum until paid, and upon the remainder of said judgment at the rate of six per cent per annum from said date until paid, and costs at the date of said judgment, taxed at the sum

of $——, and accruing costs, and also a decree foreclosing the lien of said State of Arizona, for taxes upon all the property in said judgment set forth and described, and hereinafter fully set forth and described, to wit:

The following patented mines situate in the Tyndall Mining District, Santa Cruz County, State of Arizona, known as the "Alto Group," viz.:

MINERAL WEST, the location notice of which is recorded in Book 1 of Mining Locations, at page 76, records of Santa Cruz County, Arizona. [95]

ALBERT, the location notice of which is recorded in Book 1 of Mining Locations, at page 58, records of Santa Cruz County, Arizona.

ALBERT No. 2, the location notice of which is recorded in Book 1 of Mining Locations, at page 73, records of Santa Cruz County, Arizona.

OAK, the location notice of which is recorded in Book 1 of Mining Locations, at page 52, records of Santa Cruz County, Arizona.

OPHIR No. 1, the location notice of which is recorded in Book 5 of Mining Locations, at page 188, records of Santa Cruz County, Arizona.

OPHIR No. 2, the location notice of which is recorded in Book 5 of Mining Locations, at page 189, records of Santa Cruz County, Arizona.

EXCELSIOR WEST, the location notice of which is recorded in Book 1 of Mining Locations, at page 93, records of Santa Cruz County, Arizona.

EXCELSIOR, the location notice of which is recorded in Book 1 of Mining Locations, at page 85, records of Santa Cruz County, Arizona.

HILL SIDE, the location notice of which is recorded in Book 2 of Mining Locations, at page 160, records of Santa Cruz County, Arizona.

BUENA VISTA, the location notice of which is recorded in Book 1 of Mining Locations, at page 86, records of Santa Cruz County, Arizona.

DONAU, the location notice of which is recorded in Book 1 of Mining Locations, at page 88, records of Santa Cruz County, Arizona.

GREAT WESTERN, the location notice of which is recorded in Book 2 of Mining Locations, at page 162, records of Santa Cruz County, Arizona.

RECORD, the location notice of which is recorded in Book 5 of Mining Locations, at page 191, records of Santa Cruz County, Arizona.

ALBIAN, the location notice of which is recorded in Book 1 of Mining Locations, at page 54, records of Santa Cruz County, Arizona.

STEINFELD, the location notice of which is recorded in Book 1 of Mining Locations, at page 56, records of Santa Cruz County, Arizona.

STEINFELD WEST, the location notice of which is recorded in Book 1 of Mining Locations, at page 80, records of Santa Cruz County, Arizona.

ALTO, the location notice of which is recorded in Book 1 of Mining Locations, at page 81, records of Santa Cruz County, Arizona.

ALTO EAST, the location notice of which is recorded in Book 1 of Mining Locations, at page 82, records of Santa Cruz County, Arizona.

GRAND PRIZE, the location notice of which is recorded in Book 1 of Mining Locations at page 84, records of Santa Cruz County, Arizona.

MINERAL No. 1, the location notice of which is recorded in Book 1 of Mining Locations, at page 50, records of Santa Cruz County, Arizona.

MINERAL No. 2, the location notice of which is recorded in Book 1 of Mining Locations, at page 74, records of Santa Cruz County, Arizona.

The foregoing descriptions should be construed as follows: Book and Page of Mining Locations, in the office of the County Recorder of the said County of Santa Cruz, Arizona. Application for United States Patents has been made upon each and all of the hereinabove described mines and mining claims, and final receipt has issued, but the patents have as yet not been issued.

Also all personal property which is attached to and included in the assessment levied upon the "Excelsior West" patented mine;

All as appears to us of record, and a copy of which judgment and decree is hereto annexed and made a part hereof; and

WHEREAS, the judgment-roll in the action in which said judgment is rendered is filed in the Clerk's office in said Court in the said County of Santa Cruz, and the said judgment was docketed in the said Clerk's office in the said County, on the 15th day of December, 1913, and the said sum of $3,241.35, together with interest, as aforesaid, and together with plaintiff's costs amounting to the sum of $——

is now at the date of this writ actually due on said judgment and said foreclosure of said lien and order of sale. [96]

NOW, YOU, THE SAID SHERIFF, ARE HEREBY REQUIRED AND COMMANDED, to levy upon, advertise and sell the hereinabove described properties, or so much thereof as may be necessary to pay said judgment and subsequent costs and interest, the same as you might do under ordinary execution, and make return of this writ within sixty days after your receipt hereof, with what you have done endorsed hereon.

WITNESS, Honorable W. A. O'CONNOR, Judge of the Superior Court of the State of Arizona, in and for the County of Santa Cruz, at the Courthouse of said County of Santa Cruz, this 19th day of March, A. D. 1914.

Attest my hand and the seal of said court the day and year last above written.

[Seal] (Signed) EDW. L. MIX,
Clerk of Said Superior Court.

State of Arizona,
County of Santa Cruz,—ss.

I, Robt. E. Lee, Clerk of the Superior Court of the State of Arizona, in and for the county of Santa Cruz, do hereby certify that the attached and foregoing is a full, true and correct copy of the original writ of execution, issued in the foregoing entitled cause, as the same appears of record and on file in my office, and that the same has never been amended, modified, reversed or set aside, in any manner whatsoever.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Superior Court, at Nogales, Santa Cruz County, Arizona, this 3d day of November, A. D. 1919.

_____,

Clerk of Said Superior Court. [97]

In the Superior Court of the State of Arizona, in and for the County of Santa Cruz.

RAYMOND R. EARHART, Treasurer and *Ex-Officio* Tax Collector, in and for the County of Santa Cruz, Arizona,

Plaintiff,

vs.

THE ALTO COPPER COMPANY, a Corporation, The Santa Cruz Mines & Smelter Company, a Corporation, The Consodidated Mines, Smelter & Transportation Company, a Corporation, Alexander I. McLeod, L. J. Williams and Wilbur L. Davis, Constituting the Bondholders' Committee of the Said The Alto Copper Company and of the Said The Santa Cruz Mines & Smelter Company; The Santa Rita Company, a Corporation Organized Under the Laws of the State of New York, Arizona Copper Estate, a Corporation Organized Under the Laws of Arizona, James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisy Belle Bouldin, James

E. Bouldin, Jane Doe Bouldin, J. E. Wise and Lucia Wise, His Wife, and Albert Steinfeld and Henry F. Guerin, Receiver,

Defendants.

RETURN OF SALE.

KNOW ALL MEN BY THESE PRESENTS, That I, W. S. McKnight, sheriff of Santa Cruz County, Arizona, do hereby certify that under and by virtue of the annexed judgment and execution issued out of and under the seal of the above-entitled court, and in the above-entitled cause, and to me as such sheriff, as aforesaid, duly directed and delivered on the 19th day of March, 1914, wherein and whereby I was commanded to sell the real estate and premises therein described, to satisfy the amount of the judgment filed and docketed in the above-entitled cause and court upon the 15th day of December 1913, and which said judgment amounted to the sum of three thousand two hundred and forty-one and 35/100 dollars, together with costs amounting to four hundred and forty and 30/100 dollars, and together with interest thereon from said date until paid, and all as set forth in said judgment and execution, and all costs and accruing costs and interest, including costs of sale; [98]

That I duly levied upon all of the right, title, and interest of the Alto Copper Company, a corporation, The Santa Cruz Mines & Smelter Company, a corporation, The Consolidated Mi*ns,* Smelter & Transportation Company, a corporation, Alexander I. McLeod, L. J. Williams and Wilbur L. Davis, constituting the Bondholders' Committee of the

said The Alto Copper Company and of the said The Santa Cruz Mines & Smelter Company; The Santa Rita Company, a corporation organized under the laws of the State of New York, Arizona Copper Estate, a corporation organized under the laws of Arizona, James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisy Belle Bouldin, James E. Bouldin, Jane Doe Bouldin, J. E. Wise and Lucia Wise, his wife, and Albert Steinfeld and Henry F. Guerin, Receiver, defendants, and each and all thereof, as the same existed at the dates of the attachment of the liens for the taxes included in said judgment, and as the same existed at the date of the rendition of said judgment and at the date of the levy of said execution and at any time since upon the property and real estate as follows, to wit:

Those certain lode mining claims situate in the Tyndall Mining District, Santa Cruz County, Arizona, known as the Alto Group of Mines, to wit:

Mineral West, the location notice of which is recorded in Book 1 of Mining Locations, page 76;

Albert, the location notice of which is recorded in Book 1 of Mining Locations, page 58;

Albert No. 2, the location notice of which is recorded in Book 1 of Mining Locations, page 73;

The Oak, the location notice of which is recorded in Book 1 of Mining Locations, page 52;

Ophir No. 1, the location notice of which is recorded in Book 5 of Mining Locations, page 188;

Ophir No. 2, the location notice of which is recorded in Book 5 of Mining Locations, page 189;

Excelsior West, the location notice of which is recorded in Book 1 of Mining Locations, page 93;

Excelsior, the location notice of which is recorded in Book 1 of Mining Locations, page 85;

Hillside, the location notice of which is recorded in Book 2 of Mining Locations, page 160;

Buena Vista, the location notice of which is recorded in Book 1 of Mining Locations, page 86; [99]

Donau, the location notice of which is recorded in Book 1 of Mining Locations, page 88;

Great Eastern, the location notice of which is recorded in Book 2 of Mining Locations, page 162;

Record, the location notice of which is recorded in Book 5 of Mining Locations, page 191;

Albion, the location notice of which is recorded in Book 1 of Mining Locations, page 54;

Steinfeld, the location notice of which is recorded in Book 1 of Mining Locations, page 56;

Steinfeld West, the location notice of which is recorded in Book 1 of Mining Locations, page 80;

Alto, the location notice of which is recorded in Book 1 of Mining Locations, page 81;

Alto East, the location notice of which is recorded in Book 1 of Mining Locations, page 82;

Grand Prize, the location notice of which is recorded in Book 1 of Mining Locations at page 84;

Mineral No. 1, the location notice of which is recorded in Book 1 of Mining Locations at page 50;

Mineral No. 2, the location notice of which is recorded in Book 1 of Mining Locations, page 74.

The foregoing descriptions should be construed as follows: Book and page of Mining Locations, in the office of the county recorder of the said county of Santa Cruz, Arizona. Application for United States Patent has been made upon each *al* of the hereinabove described mines and mining claims, and final receipt has issued, but the patents have as yet not been issued.

Together with all and singular the rights and appurtenances thereto and therein, or in anywise appertaining or belonging;

That I made said levy by filing a copy of said judgment and said execution with the levy endorsed thereon and the description of the property, in the office of the county recorder of said county of Santa Cruz, and advertised said sale according to law in the "Oasis," a newspaper published weekly in the city of Nogales, said county, for more than twenty-one days prior to the date fixed for said sale, according to the certificate of the Foreman, Michael Behan of said newspaper hereto attached and by reference made a part herein, and the notice of said sale was posted by me in three public places in the County of Santa Cruz, [100] one of which places was the courthouse door of the courthouse of said county for more than three weeks before the date of said sale, and all as required by law; that said sale was originally noticed to take place on the 21st day of April, 1914, at the hour

of eleven o'clock in the forenoon and at the west door of the courthouse of the said County of Santa Cruz; that at said time I attended at said place, and for good and sufficient cause duly postponed said sale until the 22d day of June, 1914, at the hour of eleven o'clock in the forenoon; that on the 22d day of June, 1914, I attended at said place and time, and for good and sufficient cause duly postponed said sale until the 29th day of June, 1914; at the hour of eleven o'clock in the forenoon at the same place; that I duly noted upon the posted notices of said sale, the said respective adjournments, and that the publication of said notice of sale was duly continued and each postponement duly noted in said publication; that in pursuance to said judgment and execution and notice of sale I attended said sale at the hour of eleven o'clock in the forenoon on the 29th day of June, 1914, at the West door of the courthouse of the said county of Santa Cruz, in the city of Nogales, and did there and then offer the said property for sale, first offering the same in separate lots or parcels, and that I did sell said property in manner following to Samuel F. Noon, he being the best and highest bidder for same, that is to say that I did sell to the said Samuel F. Noon the

MINERAL WEST, the location notice of which is recorded in Book 1, of Mining Locations, at page 76, records of Santa Cruz County, Arizona, for the sum and price of fifty dollars, gold coin of the United States.

ALBERT No. 2, the location notice of which is recorded in Book 1 of Mining Locations, at page 73, records of Santa Cruz County, Arizona, for the sum and price of fifty dollars, gold coin of the United States.

ALBERT, the location notice of which is recorded in Book 1 of Mining Locations, at page 58, records of Santa Cruz County, Arizona, for the sum and price of fifty dollars, gold coin of the United States.

STEINFELD WEST, the location notice of which is recorded in Book 1 of Mining Locations, at page 80, records of Santa Cruz County, Arizona, for the sum and price of twenty-five dollars, gold coin of the United States.

OPHIR No. 2, the location notice of which is recorded in Book 5 of Mining Locations at page 189, records of Santa Cruz County, Arizona, for the sum and price of twenty-five dollars gold coin of the United States.

OPHIR No. 1, the location notice of which is recorded in Book 5 of Mining Locations at page 188, records of Santa Cruz County, Arizona, for the sum and price of twenty-five dollars, gold coin of the United States. [101]

BUENA VISTA, the location notice of which is recorded in Book 1 of Mining Locations at page 86, Records of Santa Cruz County, Arizona, for the sum and price of twenty-five dollars, gold coin of the United States.

DONAU, the location notice of which is recorded in Book 1 of Mining Locations, at page 88,

records of Santa Cruz County, Arizona, for the sum and price of twenty-five dollars, gold coin of the United States.

GREAT EASTERN, the location notice of which is recorded in Book 2 of Mining Locations, at page 162, records of Santa Cruz County, Arizona, for the sum and price of twenty-five dollars, gold coin of the United States.

GRAND PRIZE, the location notice of which is recorded in Book 1 of Mining Locations at page 84, records of Santa Cruz County, Arizona, for the sum and price of twenty-five dollars, gold coin of the United States.

RECORD, the location notice of which is recorded in Book 5, of Mining Locations, at page 191, records of Santa Cruz County, Arizona, for the sum and price of twenty-five dollars, gold coin of the United States.

HILLSIDE, the location notice of which is recorded in Book 2 of Mining Locations, at page 160, records of Santa Cruz County, Arizona, for the sum and price of twenty-five dollars, gold coin of the United States.

ALTO, the location notice of which is recorded in Book 1 of Mining Locations, at page 81, records of Santa Cruz County, Arizona, for the sum and price of one thousand dollars, gold coin of the United States.

That after selling the above, I continued to offer the said property in parcels until I had offered the whole thereof, and did receive no bid for the same.

That thereupon I offered all of the remainder of said property not sold as aforesaid, to wit:

> OAK, the location notice of which is recorded in Book 1, of Mining Locations, at page 52; EXCELSIOR WEST, the location notice of which is recorded in Book 1 of Mining Locations, at page 93; EXCELSIOR, the location notice of which is recorded in Book 1 of Mining Locations, at page 85; ALBIAN, the location notice of which is recorded in Book 1 of Mining Locations, at page 54; STEINFELD, the location notice of which is recorded in Book 1 of Mining Locations at age 56; ALTO EAST, the location notice of which is recorded in Book 1 of Mining Locations, at page 82; MINERAL No. 1, the location notice of which is recorded in Book 1 of Mining Locations, at page 50; and MINERAL No. 2, the location notice of which is recorded in Book 1 of Mining Locations, at page 74, all said records being records of Santa Cruz County, Arizona, for the sum and price of Two thousand three hundred and sixteen dollars and sixty-five cents ($2,316.65),

in one lot and sold the same to the said Samuel F. *B*oon, he being the highest and best bidder for said, for the sum of two thousand three hundred and sixteen and 65/100 dollars, cash, making a total amount received from the sale of all of said properties from the said Samuel F. Noon, of three thousand six hundred and ninety-one and 65/100 dollars; that the said Samuel F. Noon has paid

to me in lawful money the said sum of three thousand six hundred and ninety-one and 65/100 dollars, and I have issued and delivered to [102] him a certificate of sale to said property, and have filed a copy thereof in the office of the Recorder of the said County of Santa Cruz; that I return this execution fully satisfied.

Dated this 29th day of June, 1914.

(Signed) W. S. McKNIGHT,
Sheriff of Santa Cruz County, Arizona.
By I. Burgoon,
Deputy.

State of Arizona,
County of Santa Cruz,—ss.

I, Robt. E. Lee, clerk of the Superior Court of the State of Arizona, in and for the County of Santa Cruz, do hereby certify that the attached and foregoing is a full, true and correct copy of the original sheriff's return of sale, on the execution issued in the foregoing entitled cause, as the same appears of record and on file in my office, and that the same has never been amended, modified or set aside in any respect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Superior Court at Nogales, Arizona, this 3d day of November, A. D. 1919.

_____,
Clerk of Said Superior Court.

[Endorsed]: Defendants' Exhibit 4 Marked for Identification. Nov. 4th, 1919. [103]

Defendants' Exhibit No. 5.

CERTIFICATE OF SALE.

I, W. S. McKnight, sheriff of the County of Santa Cruz, State of Arizona, do hereby certify that under and by virtue of the final judgment and decree and of a writ of execution of the Superior Court of the County of Santa Cruz, State of Arizona, in that certain action lately pending in said court upon the suit of the State of Arizona, at the relation and to the use of Raymond R. Earhart, treasurer and *ex-officio* tax collector in and for the County of Santa Cruz in the State of Arizona, plaintiff, against The Alto Copper Company, a corporation, The Santa Cruz Mines and Smelter Company, a corporation, The Consolidated Mines, Smelter and Transportation Company, a corporation, Alexander I. McLeod, L. J. Williams and Wilbur L. Davis, constituting the Bondholders' Committee of the said The Alto Copper Company and the said The Santa Cruz Mines and Smelter Company, the Santa Rita Company, a corporation organized under the laws of the State of New York; Arizona Copper Estate, a corporation organized under the laws of Arizona; James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisy Belle Bouldin, James E. Bouldin, Jane Doe Bouldin, J. E. Wise and Lucia Wise, his wife, and Albert Steinfeld and Henry F. Guerin, as receivers, de-

fendants, and being cause No. 156 in said court, duly certified to me under the seal of said court on the 19th day of March, 1914, and all to me as such sheriff duly directed and delivered, whereby I was commanded to sell the property hereinafter set forth, according to law, and to apply the proceeds of such sale towards the indebtedness on said judgment in said action, amounting, on the 5th day of December, 1913, to the sum of $3,241.35, together with interest on the sum of $2,038.79 thereof from date at the rate of twelve per cent per annum until paid, and upon the remainder of said judgment at the rate of six per cent per annum from said date until paid, and costs at the date of said judgment taxed at the sum of $——, and accruing costs, amounting in all, on the 29th day of June, 1914, to the sum of [104] $3,681.65. That said sale was originally noticed for the 21st day of April, 1914, and was on said day, for good and sufficient cause, duly postponed and continued until the 22d day of June, 1914, and was on said last-mentioned date duly postponed and continued until the 29th day of June, 1914, said continuances all being from and to the hour of eleven o'clock in the forenoon.

That on said last mentioned date, to wit: the 29th day of June, 1914, at the west door of the courthouse in said County of Santa Cruz, at the hour of eleven o'clock in the forenoon, I duly sold at public auction, according to law, and after due and legal notice, to Samuel F. Noon, who made the

highest bids therefor, the following mines and mining claims, to wit:

MINERAL WEST, the location notice of which is recorded in Book 1 of Mining Locations, at page 76, for the sum and price of $50 gold coin of the United States.

ALBERT No. 2, the location notice of which is recorded in Book 1 of Mining Locations, at page 73, for the sum and price of $50.00 in gold *coian* of the United States.

ALBERT, the location notice of which is recorded in Book 1 of Mining Locations, at page 58, for the sum and price of $50.00, gold coin of the United States.

STEINFELD WEST, the location notice of which is recorded in Book 1 of Mining Locations, at page 80, for the sum and price of $25.00, gold coin of the United States.

OPHIR No. 2, the location notice of which is recorded in Book 5 of Mining Locations, at page 189, for the sum and price of $25.00 gold coin of the United States.

OPHIR No. 1, the location notice of which is recorded in Book 5 of Mining Locations, at page 188, for the sum and price of $25.00, gold coin of the United States.

BUENA VISTA, the location notice of which is recorded in Book 1 of Mining Locations, at page 86, for the sum and price of $25.00 gold coin of the United States.

DONAU, the location notice of which is recorded in Book 1 of Mining Locations at page 88,

for the sum and price of $25.00 gold coin of the United States.

GREAT EASTERN, the location notice of which is recorded in Book 2 of Mining Locations, at page 162, for the sum and price of $25.00 gold coin of the United States.

GRAND PRIZE, the location notice of which is recorded in Book 1 of Mining Locations, at page 84, for the sum and price of $25.00 gold coin of the United States.

RECORD, the location notice of which is recorded in Book 5 of Mining Locations, at page 191, for the sum and price of $25.00 gold coin of the United States.

HILLSIDE, the location notice of which is recorded in Book 2 of Mining Locations, at page 160, for the sum and price of $25.00 gold coin of the United States.

ALTO, the location notice of which is recorded in Book 1 of Mining Locations, at page 81, for the sum and price of $1,000.00 gold coin of the United States.

OAK, the location notice of which is recorded in Book 1 of Mining Locations at page 52; EXCELSIOR WEST, the location notice of which is recorded in Book 1 of Mining Locations, at page 93; EXCELSIOR, the location notice of which is recorded in Book 1 of Mining Locations, at page 85; ALBIAN, the location notice of which [105] is recorded in Book 1 of Mining Locations, at page 54; STEINFELD, the location notice of which is recorded in Book 1 of Mining Locations, at page

56; ALTO EAST, the location notice of which is recorded in Book 1 of Mining Locations, at page 82; MINERAL No. 1, the location notice of which is recorded in Book 1 of Mining Locations, at page 50, and MINERAL No. 2, the location notice of which is recorded in Book 1 of Mining Locations, at page 74, for the sum and price of $2,316.65, the claims last mentioned having first been offered sepa*r*ately by me and I received no bids therefor.

Together with all personal property which is attached to and included in the assessment levied upon any of said mining claims.

All of the above-mentioned claims are situate in the Tyndall Mining District, County of Santa Cruz, State of Arizona, and the book and page references hereinabove made are to the books in the County Recorder's office of said County of Santa Cruz, and I do further certify that I have received the above sums of money from the said Samuel F. Noon.

And I do further certify that the said respective sums bid were the best and highest bids received for the respective parcels, and the said bidder, Samuel F. Noon, is entitled to a deed of said parcels, as provided by law.

IN WITNESS WHEREOF I have hereunto set my hand this 29th day of June, A. D. 1914.

W. S. McKNIGHT,
Sheriff of Santa Cruz County.
By _____,
Deputy.

State of Arizona,
County of Santa Cruz,—ss.

The above instrument was acknowledged before me by W. S. McKnight, as sheriff of Santa Cruz County, Arizona, on this 29th day of June, A. D. 1914.

[Seal of Court] EDW. L. MIX,
Clerk of Superior Court.

[Endorsed]: Defendants' Exhibit 5, Marked for Identification. Nov. 4th, 1919. [106]

Defendants' Exhibit No. 6.

AMENDED NOTICE OF MINING LOCATION LODE CLAIM.

TO ALL WHOM IT MAY CONCERN:

This mining claim, the name of which is the Ophir No. 2 mining claim, situate on lands belonging to the United States of America; and in which there are valuable mineral deposits, was entered upon and located for the purposes of exploration and purchase by Albert Steinfeld, the undersigned, on the 16th day of January, 1905.

The length of this claim is 1,500 feet and I claim 75 feet in an easterly direction and 1,425 feet in a westerly direction from the center of the discovery shaft, at which this notice is posted, lengthwise of the claim, together with 300 feet in width of the surface grounds, on each side of the center of said claim.

The general course of the lode deposit and premises is from the east to the west.

The claim is situated and located in the Tyndall Mining District, in Santa Cruz County, in the Territory of Arizona, about 1 mile in a northerly direction from Joe Wise's ranch house, and is the west extension of the Ophir No. 1 claim U. S. M. M. No. 2 T. D. bears east about 5,000 feet.

The surface boundaries of the claim are marked upon the ground as follows: Beginning at a monument of stones at a point in a westerly direction 1,425 feet from the discovery shaft; at which this notice is posted, being in the center of the west end line of said claim; thence northerly 300 feet to a monument of stones being the northwest corner of said claim; thence easterly 1,500 feet to a monument of stones, being at the northeast corner of said claim; thence southerly 300 feet to a monument of stones at the center of the east end of said claim; thence southerly 300 feet to a monument of stones, being at the southeast corner of said claim; thence westerly 1,500 feet to a monument of stones at the southwest corner of said claim; thence northerly [107] 300 feet to the place of beginning.

All done under the provisions of Chapter Six, of Title XXXII, of the Revised Statutes of the United States, and of an Act of the General Assembly of Arizona, entitled "An Act to Revise and Codify the Laws of the Territory of Arizona," approved March 16th, 1901.

This is an Amended Location Notice of the

Ophir No. 2 mining claim, located by J. N. Curtis on the 1st day of January, 1901, and recorded in Book 2 of Mining Locations at pages 159–160, in the office of the County Recorder of the aforesaid County of Santa Cruz, to which reference is hereby made, and this Amended Location Notice is made and posted to correct errors in the description in the said original Location Notice. Dated and posted on the ground this 16th day of January, 1905.

ALBERT STEINFELD.

Filed and recorded at the request of S. L. Kingan, January 25, A. D. 1905, at 9 A. M.

PHIL HEROLD,
County Recorder.

#83.

State of Arizona,
County of Santa Cruz,—ss.

I, Arcus Reddoch, county recorder in and for the county and state aforesaid, do hereby certify the foregoing to be a full, true and correct copy of mining location notice, as the same appears of record in my office in book, vol. 5, Mining Locations, at page 189.

WITNESS my hand and official seal this 29th day of October, A. D. 1919.

[Seal] ARCUS REDDOCH,
County Recorder. [108]

AMENDED NOTICE OF MINING LOCATION

LODE CLAIM.

TO ALL WHOM IT MAY CONCERN:

This mining claim, the name of which is the Ophir No. 1 mining claim, situate on lands belonging to the United States of America; and in which there are valuable mineral deposits, was entered upon and located for the purposes of exploration and purchase by Albert Steinfeld, the undersigned, on the 16th day of January, 1905.

The length of this claim is 1,500 feet and I claim 75 feet in a westerly direction and 1,425 feet in an easterly direction from the center of the discovery shaft, at which this notice is posted, lengthwise of the claim, together with 300 feet in width of the surface grounds, on each side of the center of said claim.

The claim is situated and located in the Tyndall Mining District, in Santa Cruz County, in the Territory of Arizona, about 1 mile in a northerly direction from Joe Wise's ranch house, and is the west extension of the Buena Vista mine, U. S. M. M. No. 2 T. D. bears east about 3,500 feet.

The surface boundaries of the claim are marked upon the ground as follows: Beginning at a monument of stones at a point in a westerly direction 75 feet from the discovery shaft; at which this notice is posted, being in the center of the west end line of said claim; thence northerly 300 feet to a monument of stones being the northwest corner of said claim; thence easterly 1,500 feet to a

monument of stones being at the northeast corner of said claim; thence southerly 300 feet to a monument of stones at the center of the east end of said claim; thence southerly 300 feet to a monument of stones being at the southeast corner of said claim; thence westerly 1,500 feet to a monument of stones at the southwest corner of said claim; thence northerly [109] 300 feet to the place of beginning.

All done under the provisions of Chapter Six, of Title XXXII, of the Revised Statutes of the United States, and of an Act of the General Assembly of Arizona, entitled "An Act to Revise and Codify the Laws of the Territory of Arizona," approved March 16th, 1901.

This is an Amended Location Notice of the Ophir No. 1 mining claim, located by J. N. Curtis on the 1st day of January, 1901, and recorded in Book 2 of Mining Locations, at pages 158, 159, in the office of the County Recorder of the aforesaid County of Santa Cruz, and to which reference is hereby made, and this Amended Location Notice is made and posted to correct errors in the description in the said original Location Notice. Dated and posted on the ground this 16th day of January, 1905.

ALBERT STEINFELD.

Filed and recorded at the request of S. L. Kingan, January 25, A. D. 1905, at 9 A. M.

PHIL HEROLD,
County Recorder.

#82.

State of Arizona,
County of Santa Cruz,—ss.

I, Arcus Reddoch, county recorder in and for the county and state aforesaid, do hereby certify the foregoing to be a full, true and correct copy of mining location notice, as the same appears of record in my office in book, vol. 5, Mining Locations, at page 188.

WITNESS my hand and official seal this 29th day of October, A. D. 1919.

[Seal] ARCUS REDDOCH,
County Recorder. [110]

NOTICE OF LOCATION.
QUARTZ CLAIM.

TO ALL WHOM IT MAY CONCERN:

This mining claim, the name of which is the Excelsior mining claim, situated on lands belonging to the United States of America, and in which there are valuable mineral deposits, was entered upon and located for the purpose of exploration and purchase by Albert Steinfeld, the undersigned, on the 22d day of May, 1899.

The length of the claim is 1,500 feet and I claim 750 feet in a westerly direction and 750 feet in an easterly direction from the center of the discovery shaft, at which this notice is posted, lengthwise of the claim together with 300 feet in width of the surface grounds, on each side of the center of said claim. The general course of the lode deposit and premises is from the east to the

west. This claim is situated and located in the Tyndall Mining District in Santa Cruz County, in the Territory of Arizona, about two miles in a northerly direction from J. Wise's ranch house about 2,000 feet northwesterly from the U. S. Mineral Monument No. 2 T. D.

The surface boundaries of the claim are marked upon the ground as follows: Beginning at monument of stones at a point in a westerly direction 750 feet from the discovery shaft (at which this notice is posted) being in the center of the west end line of said claim; thence northerly 300 feet to a monument of stones being the northwest corner of said claim; thence easterly 750 feet to a monument of stones at the center of the north side line of said claim; thence easterly 750 feet to a monument of stones being at the northeast corner of said claim; thence southerly 300 feet to a monument of stones at the center of the east end of said claim; thence southerly 300 feet to a monument of stones being at the southeast corner of said claim; thence westerly 750 feet to a monument of stones being at the center of the south side line of said claim; thence westerly 750 feet to a monument of [111] stones at the southwest corner of said claim; thence northerly 300 feet to the place of beginning.

All done under the provisions of Chapter Six of Title XXXII of the Revised Statutes of the United States, and of an act of the General Assembly of Arizona, entitled "An Act Concerning Mines" approved March 20th, 1895.

Dated and posted on the ground this 22d of May, 1899.

ALBERT STEINFELD,
Locator.

Witnesses:
J. N. CURTIS,
NICK MATHIAS.

Filed and recorded by A. Steinfeld June 22d, 99 at 12 M.

W. N. CUMMING,
County Recorder.

State of Arizona,
County of Santa Cruz,—ss.

I, Arcus Reddoch, county recorder in and for the county and state aforesaid, do hereby certify the foregoing to be a full, true and correct copy of mining location, as the same appears of record in my office in book, vol. 1, Mining Locations, at page 85.

Witness my hand and official seal this 29th day of October, A. D. 1919.

[Seal] ARCUS REDDOCH,
County Recorder. [112]

NOTICE OF LOCATION.
QUARTZ CLAIM.

TO ALL WHOM IT MAY CONCERN:

This Mining Claim the name of which is the Excelsior West Mining Claim, situated on lands belonging to the United States of America, and in which there are valuable mineral deposits, was entered upon and located for the purpose of explora-

tion and purchase by Albert Steinfeld, the undersigned, on the 22d day of May, 1899.

The length of this claim is 1500 feet and I claim 750 feet in an Easterly direction and 750 feet in a Westerly direction from the center of the discovery shaft at which this notice is posted, lengthwise of the claim together with 300 feet in width of the surface grounds, on each side of the center of said claim. The general course of the lede deposit and premises is from the east to the west. The claim is situated in the Tyndal Mining District, in Santa Cruz County, in the Territory of Arizona, about 3500 feet in a Westerly direction from the U. S. Mineral Monument No. 2 T. D. is the extension of the Excelsior mine.

The surface boundaries of the claim are marked upon the ground as follows: Beginning at a monument of stones at a point in an easterly direction 750 feet from the discovery shaft at which this notice is posted, being in the center of the east end lines of said claim; thence Northerly 300 feet to a monument of stones being the Northeast corner of said claim; thence Westerly 750 feet to a monument of stones at the center of the North side line, of said claim; thence Westerly 750 feet to a monument of stones being at the Northwest corner of said claim; thence Southerly 300 feet to a monument of stones at the center of the West end of said claim; thence Southerly 300 feet to a monument of stones being at the Southwest corner of said claim; thence Easterly 750 feet to a monument of stones being at the center of the

South side line of said claim; thence Easterly 750 feet to a monument of stones at the Southeast corner of said [113] claim; thence Northerly 300 feet to the place of beginning.

All done under the provisions of Chapter Six of Title XXXII, of the Revised Statutes of the United States, and of an act of the General Assembly of Arizona, entitled "An Act Concerning Mines" approved March 20, 1895.

Dated and posted on the ground this 22d day of May, 1899.

ALBERT STEINFELD,
Locator.

Witness:
NICK MATHIAS.

Filed and recorded request Albert Steinfeld, June 22d, 1899 at 12 M.

W. N. CUMMINGS,
County Recorder.

State of Arizona,
County of Santa Cruz,—ss.

I, Arcus Reddoch, county recorder in and for the county and state aforesaid, do hereby certify the foregoing to be a full, true and correct copy of mining location, as the same appears of record in my office in book, vol. 1, Mining Locations, at page 93.

WITNESS my hand and official seal this 29th day of October, A. D. 1919.

[Seal] ARCUS REDDOCH,
County Recorder. [114]

NOTICE OF LOCATION.

QUARTZ CLAIM.

TO ALL WHOM IT MAY *CONER*:

This Mining Claim the name of which is the *Buean* Vista Mining Claim, situated on lands belonging to the United States of America, and in which there are valuable mineral deposits, was entered upon and located for the purpose of exploration and purchase by Albert Steinfeld the undersigned, on the 20th day of May, 1899.

The length of this claim is 1500 feet and I claim 300 feet in an Easterly direction and 1200 feet in a Westerly direction from the center of the discovery shaft, at which this notice is posted, lengthwise of the claim together with 300 feet in width of the surface grounds, on each side of the center of said claim. The general course of the lode deposit and premises is from the East to the West.

This claim is situated and located in the Tyndal Mining District, in Santa Cruz County, in the Territory of Arizona about 1½ miles in a northerly direction from J. Wise's Ranch House, on the South side of El Plomo Hill, about 4000 feet Westerly from the U. S. Mineral Monument No. 2 T. D. is a relocation of an abandoned mine. The surface boundaries of the claim are marked upon the ground as follows: Beginning at a monument of stones at a point in an Easterly direction 300 feet from the discovery shaft (at which this notice is posted), being in the center of the East end line

lines, of said claim; thence Northerly 300 feet to a monument of stones being the Northeast corner of said claim; thence Westerly 750 feet to a monument of stones at the center of the North side line of said claim; thence Westerly 750 feet to a monument of stones being at the Northwest corner of said claim; thence Southerly 300 feet to a monument of stones at the center of the West end of said claim; thence Southerly 300 feet to a monument of stones being at the Southwest corner of [115] said claim; thence Easterly 750 feet to a monument of stones being at the center of the South side line of said claim; thence Easterly 750 feet to a monument of stones at the Southeast corner of said claim; thence Northerly 300 feet to the place of beginning.

All done under the provision of Chapter Six of Title XXXII of the Revised Statutes of the United States, and of an act of the General Assembly of Arizona, entitled "An Act Concerning Mines," approved March 20th, 1895.

Dated and posted on the ground this 20th day of May, 1899.

ALBERT STEINFELD,
Locator.

Witness:
J. N. CURTIS.
NICK MATHIAS.

Filed and recorded request of A. Steinfeld June 22, 1899 at 12 M.

W. N. CUMMINGS,
County Recorder.

State of Arizona,
County of Santa Cruz,—ss.

I, Arcus Reddoch, County Recorder in and for the County and State aforesaid, do hereby certify the foregoing to be a full, true and correct copy of mining location, as the same appears of record in my office in book, vol. 1, Mining Locations, page 86.

WITNESS my hand and official seal this 29th day of October, A. D. 1919.

[Seal] ARCUS REDDOCH,
County Recorder. [116]

NOTICE OF MINING LOCATION.
QUARTZ CLAIM.

TO ALL WHOM IT MAY CONCERN:

This Mining Claim, the name of which is the Hillside Mining Claim, situate on lands belonging to the United States of America, and in which there are valuable mineral deposits, was entered upon and located for the purpose of exploration and purchase by Albert Steinfeld the undersigned, on the 23d day of January, 1901.

The length of this claim is 1500 feet and I claim 200 feet in a Westerly direction and 1300 feet in an Easterly direction from the center of the discovery shaft, at which this notice is posted, lengthwise of the claim together with 300 feet in width of the surface grounds on each side of the center of said claim. The general course of the lode deposit and premises is from the East to the West.

The claim is situated and located in the Tyndal Mining District in Santa Cruz County, in the Territory of Arizona, about 1000 feet in a Northerly direction from the U. S. M. Monument, is the East extension of the Excelsior mine, adjoins the Donau Mine on the North side line and lays parallel with the same.

The surface boundaries of the claim are marked upon the ground as follows: Beginning at monument of stones at a point in a Westerly direction 200 feet from the discovery shaft (at which this notice is posted) being in the center of the Westerly end line of said claim; thence Southerly 300 feet to a monument of stones being the Southwest corner of said claim; thence Easterly 750 feet to a monument of stones at the center of the South side line of said claim; thence Easterly 750 feet to a monument of stones being at the Southeast corner of said claim; thence Northerly 300 feet to a monument of stones at the center of the Easterly end of said claim; thence Northerly 300 feet to a monument of stones being at the Northeast corner of said claim; [117] thence Westerly 750 feet to a monument of stones being at the center of the North side line of said claim; thence Westerly 750 feet to a monument of stone at the Northwest corner of said claim; thence Southerly 300 feet to the place of beginning.

All done under the provisions of Chapter Six of Title XXXII of the Revised Statutes of the United States, and of an Act of the General Assembly of Arizona, entitled "An Act Concerning Mines" approved March 20th, 1895.

Dated and posted on the ground this 23d day of January, 1901.

ALBERT STEINFELD.

Witness:

J. N. CURTIS.
JERE FRYER.

Filed and recorded at request of P. Sandoval & Co., Mar. 27, A. D. 1901, at 10:30 A. M.

M. BREEN,
Recorder.
By Phil Herold,
Deputy.

State of Arizona,
County of Santa Cruz,—ss.

I, Arcus Reddoch, County Recorder in and for the County and State aforesaid, do hereby certify the foregoing to be a full, true and correct copy of mining location, as the same appears of record in my office in book, vol. 2, Mining Locations, page 160.

WITNESS my hand and official seal this 29th day of October, A. D. 1919.

[Seal] ARCUS REDDOCH,
County Recorder. [118]

NOTICE OF LOCATION.
QUARTZ CLAIM.

TO ALL WHOM IT MAY CONCERN:

This Mining Claim the name of which is the Donau Mining Claim, situated on lands belonging to the United States of America, and in which there are valuable mineral deposits, was entered

upon and located for the purpose of exploration and purchase by Albert Steinfeld the undersigned, on the 20th day of May, 1899.

The length of the claim is 1500 feet and I claim 300 feet in an Easterly direction and 1200 feet in a Westerly direction from the center of the discovery shaft, at which this notice is posted, lengthwise of the claim together with 300 feet in width of the surface grounds, on each side of the center of said claim; the general course of the lode deposit and premises is from the East to the West.

This claim is situated and located in the Tyndal Mining District, in Santa Cruz County, in the Territory of Arizona about 600 feet in a Northwesterly direction from the U. S. Mineral Monument No. 2 T. D.—as a relocation of an abandoned property. The surface boundaries of the claim are marked upon the ground as follows: Beginning at a monument of stones at a point in an Easterly direction 300 feet from the discovery shaft (at which this notice is posted), being in the center of the East end lines of said claim; thence Northerly 300 feet to a monument of stones being the Northeast corner of said claim; thence Westerly 750 feet to a monument of stones at the center of the North side line of said claim; thence Westerly 750 feet to a monument of stones being the Northwest corner of said claim; thence Southerly 300 feet to a monument of stones at the center of the West end of said claim; thence Southerly 300 feet to a monument of stones being at the Southwest corner of said claim; thence Easterly 750 feet to a monument of stones being at the center of the South side line

of said claim; thence Easterly 750 feet to a monument of [119] stones at the Southeast corner of said claim; thence Northerly 300 feet to the place of beginning.

All done under the provisions of Chapter Six of Title XXXII, of the Revised Statutes of the United States, and of an act of the General Assembly of Arizona entitled "An Act Concerning Mines," approved March 20, 1895.

Dated and posted on the ground this 20th day of May, 1899.

ALBERT STEINFELD,
Locator.

Witness:
J. N. CURTIS.
NICK MATHIAS.

Filed and recorded request Albert Steinfeld June 22, 1899, at 12 M.

W. N. CUMMINGS,
County Recorder.

State of Arizona,
County of Santa Cruz,—ss.

I, Arcus Reddoch, county recorder in and for the county and state aforesaid, do hereby certify the foregoing to be a full, true and correct copy of mining location notice, as the same appears of record in my office in book, vol. 1, Mining Locations, at page 88.

WITNESS my hand and official seal this 29th day of October, A. D. 1919.

[Seal] ARCUS REDDOCH,
County Recorder. [120]

NOTICE OF MINING LOCATION.
QUARTZ CLAIM.

TO ALL WHOM IT MAY CONCERN:

This mining claim, the name of which is the Great Eastern Mining Claim, situate on lands belonging to the United States of America, and in which there are valuable mineral deposits was entered upon and located for the purpose of exploration and purchase by Albert Steinfeld, the undersigned, on the 24th day of January, 1901.

The length of this claim is 1500 feet and I claim 500 feet in a Westerly direction and 1000 feet in an Easterly direction from the center of the discovery shaft, at which this notice is posted, lengthwise of the claim, together with 300 feet in width of the surface grounds, on each side of the center of said claim. The general course of the lode deposit and premises is from the East to the West.

The claim is situated and located in the Tyndal Mining District in Santa Cruz County, in the Territory of Arizona, about 1½ miles in a Westerly direction from Joe Wise's Ranch House and about 1000 feet S. Westerly from the U. S. M. Monument and is the East extension of the Donau Mine.

The surface boundaries of the claim are marked upon the ground as follows: Beginning at a monument of stones at a point in a Westerly direction from 500 feet from the discovery shaft at which this notice is posted, being in the center of the Westerly end line of said claim; thence Southerly 300 feet to a Monument of stones being the Southwest corner of said claim; thence Easterly 750 feet

to a monument of stones at the center of the South side line of said claim; thence Easterly 750 feet to a monument of stones being at the Southeast corner of said claim; thence Northerly 300 feet to a monument of stones at the center of the Easterly end of said claim; thence Northerly 300 feet to a monument of stones being at the Northeast corner of said claim; thence Westerly 750 feet to a monument of stones [121] being at the center of the North side line of said claim; thence Westerly 750 feet to a monument of stones at the Northwest corner of said claim; thence Southerly 300 feet to the place of beginning.

All done under the provisions of Chapter Six of Title XXXII of the Revised Statutes of the United States, and of an act of the General Assembly of Arizona, entitled "An Act Concerning Mines" approved March 20th, 1895.

Dated and posted on the ground this 24th day of January, 1901.

ALBERT STEINFELD.

Witness:

J. N. CURTIS.

JERE FRYER.

Filed and recorded at request of P. Sandoval & Co., Mar. 27, A. D. 1901 at 10:30 A. M.

M. BREEN,
Recorder.
By Phil Herold,
Deputy.

State of Arizona,
County of Santa Cruz,—ss.

I, Arcus Reddoch, county recorder in and for the county and state aforesaid, do hereby certify the foregoing to be a full, true and correct copy of mining location, as the same appears of record in my office in book, vol. 2, Mining Locations, page 162.

WITNESS my hand and official seal this 29th day of October, A. D. 1919.

[Seal] ARCUS REDDOCH,
County Recorder. [122]

NOTICE OF LOCATION.
QUARTZ CLAIM.

TO ALL WHOM IT MAY CONCERN:

This Mining Claim, the name of which is the Grand Prize Mining Claim, situated on lands belonging to the United States of America, and in which there are valuable mineral deposits, was entered upon and located for the purpose of exploration and purchase by Albert Steinfeld, the undersigned, on the 30th day of May, 1899. The length of the claim is 1500 feet and I claim 20 feet in a Westerly direction and 1480 feet in an easterly direction from the center of the discovery shaft, at which this notice is posted, lengthwise of the claim together with 300 feet in width of the surface grounds on each side of the center of said claim. The general course of the lode deposit and premises is from the East to the West.

This claim is situated and located in the Tyndal Mining District, in Santa Cruz County, in the Territory of Arizona, about 2000 feet in a Northerly direction from the U. S. Mineral Monument No. 2 T. D. is the extension of the Alto East mine.

The surface boundaries of the claim are marked upon the ground as follows: Beginning at a point in a Westerly direction 20 feet from the discovery shaft (at which this notice is posted) being in the center of the West end lines, of said claim; thence Northerly 300 feet to a monument of stones being the Northwest corner of said claim; thence Easterly 750 feet to a monument of stones at the center of the North side line of said claim; thence Easterly 750 feet to a monument of stones being at the Northeast corner of said claim; thence Southerly 300 feet to a monument of stones at the center of the East end of said claim; thence Southerly 300 feet to a monument of stones at the Southeast corner of said claim; thence Westerly 750 feet to a monument of stones being at the center of the [123] South side line of said claim; thence Westerly 750 feet to a monument of stones at the Southwest corner of said claim; thence Northerly 300 feet to the place of beginning.

All done under the provisions of Chapter Six of Title XXXII, of the Revised Statutes of the United States, and of an act of the General Assembly of Arizona, entitled, "An Act Concerning Mines," approved March 20th, 1895.

Dated and posted on the ground this 30th day of May, 1899.

ALBERT STEINFELD,
Locator.

Witness:
NICK MATHIAS.

Filed and recorded request of A. Steinfeld June 22d, 1899, at 12 M.

W. N. CUMMINGS,
County Recorder.

State of Arizona,
County of Santa Cruz,—ss.

I, Arcus Reddoch, county recorder in and for the County and State aforesaid, do hereby certify the foregoing to be a full, true and correct copy of mining location, as the same appears of record in my office in book, vol. 1, Mining Locations, page 84.

WITNESS my hand and official seal this 29th day of October, A. D. 1919.

[Seal] ARCUS REDDOCH,
County Recorder. [124]

NOTICE OF LOCATION.
QUARTZ CLAIM.

TO ALL WHOM IT MAY CONCERN:

This Mining Claim, the name of which is the Alto East Mining Claim situated on lands belonging to the United States of America and in which there are valuable mineral deposits, was entered and located for the purpose of exploration and pur-

chase by Albert Steinfeld, the undersigned, on the 22 day of May, 1899.

The length of this claim is 1500 feet, and I claim 1000 feet in a Westerly direction and 500 feet in an Easterly direction from the center of the discovery shaft, at which this notice is posted, lengthwise of the claim, together with 300 feet in width of the surface grounds, on each side of the center of said claim. The general course of the lode deposit and premises is from the East to the West.

This claim is situated and located in the Tyndal Mining District, in Santa Cruz County, in the Territory of Arizona, about 2 miles in a Northerly direction from J. Wise's Ranch House about 2000 feet northerly from —— from the U. S. Mineral Monument No. 2 T. D. is a relocation of an abandoned mine.

The surface boundaries of the claim are marked upon the ground as follows: Beginning at a monument of stones at a point in a Westerly direction 1000 feet from the discovery shaft (at which this notice is posted) being in the center of the West end lines, of said claim; thence Northerly 300 feet to a monument of stones being the Northwest corner of said claim; thence Easterly 750 feet to a monument of stones at the center of the North side line of said claim; thence Easterly 750 feet to a monument of stones being at the Northeast corner of said claim; thence Southerly 300 feet to a monument of stones at the center of the East end of said claim; thence Southerly 300 feet to a monument of stones being at the Southeast corner of

said claim; thence [125] Westerly 750 feet to a monument of stones being at the center of the South side line of said claim; thence Westerly 750 feet to a monument of stones at the Southwest corner of said claim; thence Northerly 300 feet to the place of beginning.

All done under the provisions of Chapter Six of Title XXXII, of the Revised Statutes of the United States, and of an act of the General Assembly of Arizona, entitled "An Act Concerning Mines," approved March 20th, 1895.

Dated and posted on the ground this 22d day of May, 1899.

ALBERT STEINFELD,
Locator.

Witness:
NICK MATHIAS.

Filed and recorded request of A. Steinfeld, June 22, 1899, at 12 M.

W. N. CUMMINGS,
County Recorder.

State of Arizona,
County of Santa Cruz,—ss.

I, Arcus Reddoch, county recorder in and for the county and state aforesaid, do hereby certify the foregoing to be a full, true and correct copy of mining location notice, as the same appears of record in my office in book vol. 1, Mining Locations, page 82.

WITNESS my hand and seal of office this 29th day of October, A. D. 1919.

[Seal] ARCUS REDDOCH,
County Recorder. [126]

NOTICE OF LOCATION.
QUARTZ CLAIM.

This Mining Claim, the name of which is the Steinfeld West Mining Claim, situated on lands belonging to the United States of America, and in which there are valuable mineral deposits, was entered upon and located for the purpose of exploration and purchased by Albert Steinfeld, the undersigned, on the 30th day of May, 1899.

The length of the claim is 1500 feet and I claim 50 feet in an Easterly direction and 1450 feet in a Westerly direction from the center of the discovery shaft, at which this notice is posted, lengthwise of the claim together with 300 feet in width of the surface grounds on each side of the center of said claim. The general course of the lode deposit and premises is from the East to the West. This claim is situated and located in the Tyndal Mining District, in Santa Cruz County, in the Territory of Arizona, about 1¼ miles in a Northerly direction from J. Wise's Ranch House, is the extension of the Steinfeld Mine.

The surface boundaries of the claim are marked upon the ground as follows: Beginning at a monument of stones at a point in an Easterly direction 50 feet from the discovery shaft (at which this notice is posted), being in the center of the East end lines of said claim, thence Northerly 300 feet to a monument of stones being the Northeast corner of said claim; thence Westerly 750 feet to a monument of stones at the center of the North side line

of said claim; thence Westerly 750 feet to a monument of stones being at the Northwest corner of said claim; thence Southerly 300 feet to a monument of stones at the center of the West end of said claim; thence Southerly 300 feet to a monument of stones being at the Southwest corner of said claim; thence Easterly 750 feet to a monument of stones being at the center of the South side line of said claim; thence Easterly 750 feet to a monument of stones at the Southeast corner of said claim; thence [127] Northerly 300 feet to the place of beginning. All done under the provisions of Chapter Six of Title XXXII, of the Revised Statutes of the United States, and of an act of the General Assembly of Arizona, entitled "An Act Concerning Mines," approved March 20th, 1895.

Dated and posted on the ground this 30th day of May, 1899.

ALBERT STEINFELD,
Locator.

Witness:
NICK MATHIAS.

Filed and recorded at request of A. Steinfeld, June 22, 1899, at 12 A. M.

W. N. CUMMING,
County Recorder.

State of Arizona,
County of Santa Cruz,—ss.

I, Arcus Reddoch, county recorder in and for the county and state aforesaid, do hereby certify the foregoing to be a full, true and correct copy

of mining location, as the same appears of record in my office in book vol. 1, Mining Locations, at page 80.

WITNESS my hand and official seal this 29th day of October, A. D. 1919.

[Seal] ARCUS REDDOCH,
County Recorder. [128]

NOTICE OF LOCATION.

QUARTZ CLAIM.

TO ALL WHOM IT MAY CONCERN:

This Mining Claim, the name of which is the Albert Mining Claim, situate on lands belonging to the United States of America, and in which there are valuable mineral deposits, was entered upon and located for the purpose of exploration and purchase by Albert Steinfeld the undersigned, on the 26 day of February, 1899.

The length of the claim is 1500 feet, and I claim 300 feet in an Easterly direction and 1200 feet in a Westerly direction from the center of the discovery shaft, at which this notice is posted, lengthwise of the claim together with 300 feet in width of the surface grounds on each side of the center of said claim. The general course of the lode deposit and premises is from the East to the West.

This claim is situated and located in the Tyndal Mining District in Santa Cruz County, in the Territory of Arizona, about 2 miles in a Northerly direction from J. Wise's Ranch House on the top of what is known as El Plomo Hill, this is a relocation of an abandoned property.

The surface boundaries of the claim are marked upon the ground as follows: Beginning at a monument of stones at a point in an easterly direction three hundred feet from the discovery shaft (at which this notice is posted) being in the center of the East end lines, of said claim; thence Northerly 300 feet to a monument of stones being the Northeast corner of said claim; thence Westerly 750 feet to a monument of stones at the center of the North side line of said claim; thence Westerly 750 feet to a monument of stones being at the Northwest corner of said claim; thence Southerly 300 feet to a monument of stone at the center of the West end of said claim; thence Southerly 300 feet to a monument of stones being at the Southwest corner of said claim; thence Easterly 750 feet to a monument of stones being at the center of [129] the South side line of claim; thence Easterly 750 feet to a monument of stones at the Southeast corner of said claim; thence Northerly 300 feet to the place of beginning.

All done under the provision of Chapter Six of Title XXXII, of the Revised Statutes of the United States, and of an act of the General Assembly of Arizona entitled "An Act Concerning Mines," approved March 20, 1895.

Dated and posted on the ground this 26 day of February, 1899.

ALBERT STEINFELD,
Locator.

Witness:
J. N. CURTIS.

Filed and recorded req. Alb. Steinfeld May 25, 1899, at 10 A. M.

W. N. CUMMINGS,
County Recorder.

State of Arizona,
County of Santa Cruz,—ss.

I, Arcus Reddoch, county recorder in and for the county and state aforesaid, do hereby certify the foregoing to be a full, true and correct copy of mining location, as the same appears of record in my office in book vol. 1, Mining Locations, page 58.

WITNESS my hand and official seal this 29th day of October, A. D. 1919.

[Seal] ARCUS REDDOCH,
County Recorder. [130]

NOTICE OF LOCATION.

QUARTZ CLAIM.

TO ALL WHOM IT MAY CONCERN:

This Mining Claim, the name of which is the Steinfeld Mining Claim, situate on lands belonging to the United States of America, and in which there are valuable mineral deposits, was entered upon and located for the purpose of exploration and purchase by Albert Steinfeld the undersigned, on the 26th day of February, 1899.

The length of the claim is 1500 feet, and I claim 1350 feet in an Easterly direction, and 150 feet in a Westerly direction from the center of the discovery shaft, at which this notice is posted, lengthwise of the claim, together with 300 feet in width

of the surface grounds, on each side of the center of said claim. The general course of the lode deposit and premises is from the East to the West.

The claim is situated and located in the Tyndal Mining District in Santa Cruz County, in the Territory of Arizona, about 1½ miles in a Northerly direction from J. Wise's Ranch House, on the South side of what is commonly known as El Plomo Hill. This is a relocation of an abandoned property.

The surface boundaries of the claim are marked upon the ground as follows: Beginning at a monument of stones at a point in a Westerly direction one hundred and fifty (150) feet from the discovery shaft (at which this notice is posted) being in the center of the West end lines of said claim; thence Southerly 300 feet to a monument of stones being the Southwest corner of said claim; thence Easterly 750 feet to a monument of stones at the center of the South side line of said claim; thence Easterly 750 feet to a monument of stones being at the Southeast corner of said claim; thence Northerly 300 feet to a monument of stones at the center of the East end of said claim; thence Northerly 300 feet to a monument of stones being at the Northeast corner of said claim; thence Westerly 750 feet to a monument of [131] stones being at the center of the North side line of said claim; thence Westerly 750 feet to a monument of stones at the Northwest corner of said claim; thence Southerly 300 feet to the place of beginning.

All done under the provisions of Chapter Six of Title XXXII, of the Revised Statutes of the United

States, and of an act of the General Assembly of Arizona, entitled, "An Act Concerning Mines," approved March 20, 1895.

Dated and posted on the ground this 26th day of February, 1899.

ALBERT STEINFELD,
Locator.

Witnesses:
J. N. CURTIS.
NICK MATHIAS.

Filed and recorded req. Alb. Steinfeld May 25, 1899, at 10 A. M.

W. N. CUMMINGS,
County Recorder.

State of Arizona,
County of Santa Cruz,—ss.

I, Arcus Reddoch, county recorder in and for the county and state aforesaid, do hereby certify the foregoing to be a full, true and correct copy of mining location, as the same appears of record in my office in book vol. 1, Mining Locations, page 56.

WITNESS my hand and official seal this 29th day of October, A. D. 1919.

[Seal] ARCUS REDDOCH,
County Recorder. [132]

NOTICE OF LOCATION.
QUARTZ CLAIM.

TO ALL WHOM IT MAY CONCERN:

This Mining Claim, the name of which is the Alto Mining Claim, situated on lands belonging to

the United States of America, and in which there are valuable mineral deposits, was entered upon and located for the purpose of exploration and purchase by Albert Steinfeld the undersigned, on the 22d day of May, 1899.

The length of this claim is 1500 feet and I claim 685 feet in an Easterly direction and 815 feet in a Westerly direction from the center of the discovery shaft, at which this notice is posted, lengthwise of the claim together with 300 feet in width of the surface grounds, on each side of the center of said claim. The general course or the lode deposit and premises is from the East to the West. This claim is situated and located in the Tyndal Mining District, in Santa Cruz County, in the Territory of Arizona, about 1½ miles in a Northerly direction from J. Wise's Ranch House, on what is commonly known as El Plomo Hill, about 2500 —— Northwesterly from the U. S. Mineral Monument No. 2 T. D. is a relocation of an abandoned mine. The surface boundaries of the claim are marked upon the ground as follows: Beginning at a monument of stones at a point in an Easterly direction 685 feet from the discovery shaft, at which this notice is posted, being in the center of the East side lines of said claim; thence Northerly 300 feet to a monument of stones being the Northeast corner of said claim; thence westerly 750 feet to a monument of stones at the center of the North side line of said claim; thence Westerly 750 feet to a monument of stones being at the Northwest corner of said claim; thence Southerly 300 feet to a

monument of stones at the center of *of* the west end of said claim; thence southerly 300 feet to a monument of stones at the southwest corner of said claim; thence [133] Easterly 750 feet to a monument of stones being at the center of the South side line of said claim; thence Easterly 750 feet to a monument of stones at the Southeast corner of said claim; thence Northerly 300 feet to the place of beginning.

All done under the provisions of Chapter Six of Title XXXII, of the Revised Statutes of the United States, and of an act of the General Assembly of Arizona, entitled "An Act Concerning Mines," approved March 20th, 1895.

Dated and posted on the ground this 22 day of May, 1899.

ALBERT STEINFELD,
Locator.

Witness:
NICK MATHIAS.

Filed and recorded request of A. Steinfeld June 22, 1899, at 12 M.

W. N. CUMMINGS,
County Recorder.

State of Arizona,
County of Santa Cruz,—ss.

I, Arcus Reddoch, county recorder in and for the county and state aforesaid, do hereby certify the foregoing to be a full, true and correct copy of mining location, as the same appears of record in my office in book vol. 1, Mining Locations, at page 81.

WITNESS my hand and official seal this 29th day of October, 1919.

[Seal] ARCUS REDDOCH,
County Recorder. [134]

NOTICE OF LOCATION.

QUARTZ CLAIM.

TO ALL WHOM IT MAY CONCERN:

This Mining Claim, the name of which is the Albion Mining Claim, situate on lands belonging to the United States of America, and in which there are valuable mineral deposits, was entered upon and located for the purpose of exploration and purchase by Albert Steinfeld, the undersigned, on the 26th day of February, 1899.

The length of the claim is 1,500 feet, and I claim 200 feet in an easterly direction and 1,300 feet in a westerly direction from the center of the discovery shaft, at which this notice is posted, lengthwise of the claim, together with 300 feet in width of the surface grounds, on each side of the center of said claim. The general course of the lode deposit and premises is from the east to the west.

This claim is situated and located in the Tyndal Mining District, in Santa Cruz County, in the Territory of Arizona, about two miles in a northerly direction from J. Wise's ranch house, in the east extension of the Oak Mine. This is a relocation of an abandoned property.

The surface boundaries of the claim are marked upon the ground as follows: Beginning at a monument of stones at a point in an easterly direction fifty (50) feet from the discovery shaft (at which

this notice is posted), being in the center of the east end lines of said claim; thence northerly 300 feet to a monument of stones being the northeast corner of said claim; thence westerly 750 feet to a monument of stones at the center of the north side line of said claim; thence westerly 750 feet to a monument of stones being at the northwest corner of said claim; thence southerly 300 feet to a monument of stones at the center of the west end of said claim; thence southerly 300 feet to a monument of stones being in the southwest corner of said claim; thence easterly 750 feet to a monument of stones being at the [135] center of the south side line of said claim; thence easterly 750 feet to a monument of stones at the southeast corner of said claim; thence northerly 300 feet to the place of beginning.

All done under the provisions of Chapter Six of Title XXXII of the Revised Statutes of the United States, and of an act of the General Assembly of Arizona, entitled "An Act Concerning Mines," approved March 20, 1895.

Dated and posted on the ground this 26th day of February, 1899.

ALBERT STEINFELD,
Locator.

Witnesses:
J. N. CURTIS.
NICK MATHIAS.

Filed and recorded req. Alb. Steinfeld May 20, 1899, at 10 A. M.

W. N. CUMMINGS,
County Recorder.

State of Arizona,
County of Santa Cruz,—ss.

I, Arcus Reddoch, county recorder in and for the county and state aforesaid, do hereby certify the foregoing to be a full, true and correct copy of mining location, as the same appears of record in my office in book vol. 1, Mining Locations, at page 54.

WITNESS my hand and official seal this 29th day of October, A. D. 1919.

[Seal] ARCUS REDDOCH,
County Recorder. [136]

AMENDED NOTICE OF MINING LOCATION.
LODE CLAIM.

TO ALL WHOM IT MAY CONCERN:

This Mining Claim, the name of which is the Record Mining Claim, situate on lands belonging to the United States of America, and in which there are valuable mineral deposits, was entered upon and located for the purposes of exploration and purchase by Albert Steinfeld the undersigned, on the 16th day of January, 1905.

The length of this claim is 1500 feet and I claim 550 feet in a Westerly direction, and 950 feet in an Easterly direction from the center of the discovery shaft, at which this notice is posted, lengthwise of the claim, together with 300 feet in width of the surface grounds; on each side of the center of said claim; The general course of the lode deposit and premises is from the East to the West.

The claim is situated and located in the Tyndal Mining District in Santa Cruz County, in the Territory of Arizona, about 1½ miles in a Northerly direction from Joe Wise's Ranch House and about 2500 feet N. Easterly from the Old Plomo Camp U. S. M. M. No. 2 T. D. Bears South about 3000 feet.

The surface boundaries of the claim are marked upon the ground as follows: Beginning at a monument of stones at a point in a Westerly direction 550 feet from the discovery shaft; at which this notice is posted, being in the center of the West end line of said claim; thence Northerly 300 feet to a monument of stones being the Northwest corner of said claim; thence Easterly 1500 feet to a monument of stones being at the Northeast corner of said claim; thence Southerly 300 feet to a monument of stones at the center of the East end of said claim; thence Southerly 300 feet to a monument of stones, being at the Southeast corner of said claim; thence Westerly 1500 feet to a monument of stones at the Southwest corner of said claim; thence Northerly 300 feet to the place of beginning; [137]

All done under the provisions of Chapter Six, of Title XXXII, of the Revised Statutes of the United States, and of an Act of the General Assembly of Arizona, entitled "An Act to Revise and Codify the Laws of the Territory of Arizona" approved March 16, 1901.

This is an Amended Location Notice of the Record Mining Claim, located by J. N. Curtis on

the 1st day of Jan. 1901, and recorded in book 2, Mining Locations at page 156, 7, 8, in the office of the County Recorder of the aforesaid County of Santa Cruz, to which reference is hereby made, and this Amended Location Notice is made and posted to correct errors in the description in the said original Location Notice.

Dated and posted on the ground this 16th day of January, 1905.

ALBERT STEINFELD.

Filed and recorded at the request of S. L. Kingan, Jan'y 25 A. D. 1905, at 9 A. M.

PHIL HEROLD,
County Recorder.

#84.

State of Arizona,
County of Santa Cruz,—ss.

I, Arcus Reddoch, county recorder in and for the county and state aforesaid, do hereby certify the foregoing to be a full, true and correct copy of mining location notice, as the same appears of record in my office, in book, vol. 5, Mining Locations, at page 191.

Witness my hand and official seal this 29th day of October, A. D. 1919.

[Seal] ARCUS REDDOCH,
County Recorder. [138]

Defendants' Exhibit No. 7.

In the Superior Court of Santa Cruz County, State of Arizona.

RAYMOND R. EARHART, Treasurer and *Ex-Officio* Tax Collector in and for the County of Santa Cruz in the State of Arizona,

Plaintiff,

vs.

THE ALTO COPPER COMPANY, a Corporation, The Santa Cruz Mines & Smelter Company, a Corporation, The Consolidated Mines, Smelter and Transportation Company, a Corporation, Alexander I. McLeod, L. J. Williams and Wilbur L. Davis, Constituting the Bondholders' Committee of the said The Alto Copper Company and of the said The Santa Cruz Mines & Smelter Company; The Santa Rita Company, a Corporation Organized Under the Laws of the State of New York, Arizona Copper Estate, a Corporation Organized Under the Laws of Arizona, James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisy Belle Bouldin, James E. Bouldin, Jane Doe Bouldin, J. E. Wise, and Lucia Wise, His Wife, and Albert Steinfeld and Henry F. Guerin, Receivers,

Defendants.

MINUTE ENTRY OF AUGUST 30th, 1913.

The defendants herein having heretofore presented to the Court and filed herein their demurrer to plaintiff's complaint in this action, comes now the plaintiff herein by his counsel, W. A. O'Connor, Esq., and presents to the court and files herein his motion in writing asking that hearing of said demurrer be set for an early day; Whereupon, the Court now instructs the clerk to request counsel for defendants to advise the Court the earliest date on which said demurrer may be called for hearing.

RAYMOND R. EARHART, Treasurer and *Ex-officio* Tax Collector in and for the County of Santa Cruz in the State of Arizona,

Plaintiff,

vs.

THE ALTO COPPER COMPANY, a Corporation, The Santa Cruz Mines and Smelter Company, a Corporation,

Defendants.

MINUTE ENTRY OF SEPTEMBER 6th, 1913.

The defendants herein having heretofore presented to the [139] Court and filed herein, their demurrer to plaintiff's complaint in this action, it is by the Court,

ORDERED, THAT Saturday, September 20th, 1913, be and the same is now hereby fixed as the time for hearing argument on said demurrer.

RAYMOND R. EARHART, Treasurer and *Ex-officio* Tax Collector in and for the County of Santa Cruz in the State of Arizona,

Plaintiff,

vs.

THE ALTO COPPER COMPANY, a Corporation, *at* al.,

Defendants.

MINUTE ENTRY OF SEPTEMBER 20th, 1913.

ORDERED, That hearing of the demurrer of defendants to plaintiff's complaint in this cause be, and the same is hereby continued until Saturday, September 27th, 1913 at 10:00 o'clock A. M.

THE STATE OF ARIZONA, at the Relation and to the Use of RAYMOND R. EARHART, Treasurer and *Ex-officio* Tax Collector, in and for the County of Santa Cruz,

Plaintiff,

vs.

THE ALTO COPPER COMPANY, a Corporation, et als.,

Defendants.

MINUTE ENTRY OF SEPTEMBER 27th, 1913.

It is by the Court ORDERED, That the record show, which it does hereby, that S. F. Noon, Esq., is hereby entered as Attorney to represent the Defendants herein.

This being the time fixed heretofore, by order of the Court for a hearing on the demurrer of

defendants to plaintiff's complaint herein; comes now the plaintiff into open court by his attorneys, W. A. O'Conner, Esq., and the defendants represented by their attorney S. F. Noon, Esq.; Whereupon said demurrer being fully submitted to the Court, it is now by the Court

ORDERED, That the defendants' demurrer to plaintiff's [140] complaint herein be and the same is hereby overruled and denied; And upon request of counsel for defendant, it is

ORDERED FURTHER, That the defendants have until October 15th, 1913, in which to file their answer herein.

THE STATE OF ARIZONA, at the Relation and to the Use of RAYMOND R. EARHART, Treasurer and *Ex-officio* Tax Collector, in and for Santa Cruz County,

Plaintiff,

vs.

THE ALTO COPPER COMPANY, a Corporation, et al.,

Defendants.

MINUTE ENTRY OF NOVEMBER 12th, 1913.

Upon motion of counsel for the plaintiff herein, it is

ORDERED, That this cause be, and is hereby set for trial on Wednesday, November 19th, 1913.

STATE OF ARIZONA ex rel. R. R. EARHART, Tax Collector, etc,

Plaintiff,

vs.

THE ALTO COPPER COMPANY et al.,

Defendants.

MINUTE ENTRY OF NOVEMBER 15th, 1913.

The Judge of the above-entitled court having announced his disqualification to preside upon the trial of the above-entitled actions in open court, it is hereby ordered that the above-entitled cases be set for hearing before Hon. William F. Cooper, Judge of the Superior Court of Pima County, Arizona, presiding as Judge of the Superior Court of Santa Cruz County, Arizona.

Done in open Court this 15th day of November, A. D. 1913.

(Signed) W. A. O'CONNER,
Judge of the Above-entitled Court. [141]

THE STATE OF ARIZONA, at the Relation and to the Use of RAYMOND R. EARHART, Treasurer and *Ex-officio* Tax Collector, in and for Santa Cruz County,

Plaintiff,

vs.

ALTO COPPER COMPANY, a Corporation, et al.,

Defendants.

MINUTE ENTRY OF NOVEMBER 19th, 1913.

IT IS ORDERED, That the order heretofore

made setting this cause for trial at this time, be and the same is now hereby vacated.

STATE OF ARIZONA, at the Relation and to the Use of RAYMOND R. EARHART, Treasurer and *Ex-officio* Tax Collector of Santa Cruz County, in the State of Arizona,
Plaintiff,

vs.

THE ALTO COPPER COMPANY, a Corporation, The Santa Cruz Mines and Smelter Company, a Corporation, The Consolidated Mines, Smelter and Transportation Company, a Corporation, Alexander I. McLeod, L. J. Williams and Wilbur L. Davis, Constituting the Bondholders' Committee of the Said The Alto Copper Company, and the Said The Santa Cruz Mines and Smelter Company; The Santa Rita Company, a Corporation Organized Under the Laws of the State of New York, Arizona Copper Estate, a Corporation Organized Under the Laws of Arizona; James W. Vroom, Jane Doe Vroom, John Watts, Jane Doe Watts, Cornelius C. Watts, Jane Doe Watts, Dabney C. T. Davis, Jane Doe Davis, Daisy L. Bouldin, James E. Bouldin, Jane Doe Bouldin, J. E. Wise and Lucia Wise, His Wife, and Albert Steinfeld and Henry F. Guerin, Receivers,
Defendants.

MINUTE ENTRY OF DECEMBER 5th, 1913.

It is ORDERED, That Frank J. Duffy, Esq.,

be and is hereby entered as counsel for the plaintiff herein.

Upon his request it is ORDERED, That S. F. Noon, Esq., be and he is hereby granted leave to withdraw as counsel for the defendants herein.

This cause now coming on regularly at this time for trial the plaintiff appearing in person and with his attorney, Frank J. Duffy, Esq., and there being no appearance by or on behalf of the defendants, and no answer or other pleadings having been filed by [142] or on behalf of the defendants, although all of the defendants have been served with process as appears of record, and the default of the defendants having been entered according to law; and the plaintiff having announced "ready for trial," trial now proceeds before the Court sitting without a jury, trial by jury having been waived, as follows, to wit: R. R. Earhart, the plaintiff, is duly sworn as a witness and testifies; and there being no further testimony offered, and the evidence being closed, the cause is now submitted to the Court for its deliberation and decision; and the Court having heard all the evidence submitted and having carefully considered the same, and being fully advised in the premises, does now

ORDER, That Judgment be, and is hereby entered for the plaintiff and against the defendant herein, for the sum of $3,241.35, being taxes and interest due to date, clerk's fees and penalties on the said taxes and costs of suit including attorney fees, and for all accruing costs and interest, and that the lien of the State of Arizona, upon the property

taxed herein, be enforced and all equities foreclosed.

State of Arizona,
County of Santa Cruz,—ss.

I, Robt. E. Lee, Clerk of the Superior Sourt of the State of Arizona, in and for the County of Santa Cruz, do hereby certify that the attached and foregoing minute entries of said Superior Court, are full, true and correct copies of the originals thereof as the same appear in the minute-book of said Superior Court, and of each and every part thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Superior Court at Nogales, Arizona, this 1st day of November, A. D. 1919.

[Seal] ROBT. E. LEE,
Clerk of said Superior Court.

[Endorsed]: Certified Copy of Minute Entries Defts. Exhibit 7 for Identification. Nov. 4th, 1919. [143]

Defendants' Exhibit No. 8.

In the Superior Court of the State of Arizona in and for the County of Santa Cruz.

No. 155.

THE STATE OF ARIZONA, at the Relation and to the Use of R. R. EARHART, Treasurer and Tax Collector of the County of Santa Cruz, Arizona,

Plaintiff,

vs.

ALTO COPPER COMPANY et al.,

Defendants.

ORDER TO FILE AFFIDAVIT.

It appearing to the Court that Henry F. Guerin, as receiver, is one of the defendants in the above-entitled cause, and that by inadvertence his name was omitted in the affidavit of publication filed in said *cuase*, but it appearing further that said Guerin was actually served aand a copy of the complaint in said cause, with summons attached thereto, was duly served upon him, and the said Guerin being Receiver of this Court in another cause, and the Court having jurisdiction over the said Guerin as such receiver.

It is ORDERED that the plaintiff in the above-entitled cause *my* now file *nunc pro tunc* an affidavit for service by publication, and that said affidavit when so filed shall have like force and

effect as if filed prior to the service by publication made in the above-entitled cause.

Dune at Nogales, Arizona, this 25th day of March, 1914.

(Signed) W. A. O'CONNOR,
Judge.

State of Arizona,
County of Santa Cruz,—ss.

I, Robt. E. Lee, Clerk of the Superior Court of the State of Arizona, in and for the county of Santa Cruz, do hereby certify that the attached and foregoing is a full, true and correct copy of the original order filed in the above-entitled cause, as the same appears of record and on file in [144] this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Superior Court at Nogales, Arizona, this 3d day of November, A. D. 1919.

[Seal Omitted] ————————————,
Clerk of said Superior Court.

[Endorsed]: Certified copies. Order. Defts. Exhibit 8 Marked for Identification. Nov. 4th, 1919. Filed March 25, 1914. Edw. L. Mix, Clerk. [145]

Defendants' Exhibit No. 9.

In the Superior Court of the State of Arizona, in and for the County of Santa Cruz.

No. 155.

THE STATE OF ARIZONA, at the Relation and to the Use of RAYMOND R. EARHART, Treasurer and Tax Collector of the County of Santa Cruz,

Plaintiffs,

vs.

ALTO COPPER COMPANY, a Corporation, et al.,

Defendants.

AFFIDAVIT OF RAYMOND R. EARHART.

Raymond R. Earhart, being first duly sworn, deposes and says that he is the same R. R. Earhart at whose relation and use the above-entitled action has been commenced and is maintained. That the defendant, Henry F. Guerin, Receiver, is a non-resident of the State of Arizona, and is absent from said State, and is a resident, as affiant is informed and believes, of the State of Ohio, and resides at the city of Columbus in said state, but that the street number and address of said Guerin is unknown to this affiant, save and except, that his office is in Hartman Bldg., said city, and that all of above facts existed and were true at the time of filing, and during continuance of said action.

(Signed) RAYMOND R. EARHART.

Subscribed and sworn to before me this 25th day of March, 1914.

[Seal] (Signed) PHIL HEROLD,
Notary Public.

My commission expires Feby. 23, 1916.

State of Arizona,
County of Santa Cruz,—ss.

I, Robt. E. Lee, Clerk of the Superior Court of the State of Arizona, in and for the county of Santa Cruz, do hereby certify that the attached and foregoing is a full, true and correct copy of an original affidavit of R. R. Earhart, [146] treasurer aforesaid, as the same appears of record and on file in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Superior Court at Nogales, Arizona, this 3d day of November, A. D. 1919.

_____,
Clerk of said Superior Court.

[Endorsed]: Certified Copy. Affidavit. Defts. Exhibit 9 Marked for Identification. Filed March 25, 1914. Edw. L. Mix, Clerk. [147]

Defendants' Exhibit No. 10.

In the United States District Court for the District of Arizona.

No. 107—At LAW (Tucson).

JAMES E. BOULDIN et al.,

Plaintiffs,

against

ALTO MINES COMPANY et al.,

Defendants.

Defendant's exhibit referred to on page 22 of the stenographer's transcript of proceedings herein, being section 18 of the bill in Lane vs. Watts, filed December 11, 1908:

18. "That thereafter, though thereunto frequently required and requested by the heirs and representatives of Luis Maria Baca, the Commissioner of the General Land Office failed and refused to continue, or have made, the said survey ordered by the Commissioner of the General Land Office on April 9, 1864, and persisted in said failure and refusal until, on or about June 17, 1905, on which date the Commissioner of the General Land Office, by an official order of the said date, authorized and directed the Surveyor General of Arizona, to cause a survey to be made and that pursuant to said order of the Commissioner and under contract No. 136, dated June 17, 1905, one Phillip Contzen was authorized and required to run the

lines indicated in the application to locate Float No. 3 hereinbefore set out, so as to adjust the lines, as near as might be, to the lines of the public surveys.

That pursuant to said order and said contract, the said Phillip Contzen and others made the said survey of said lines and forwarded the same to Surveyor General of Arizona; that *or* or about November 23, 1906, the Surveyor General of Arizona made the following endorsement upon said plat of said survey: 'This plat of Baca Float No. 3, private land claim, situated in Santa Cruz County in the Territory of Arizona, is strictly conformable to the field notes of survey thereof executed from November 3 to December 23, 1905, by Phillip Contzen, Deputy Surveyor, under his contract No. 136, dated June 17, 1905, which have been examined, approved and filed in this office. U. S. Surveyor General's Office, Phoenix, Arizona, November 23, 1906. Frank S. Ingalls, U. S. Surv. " 'Gen'l'; and that the said plat and survey have been examined and found correct by the Commissioner of the General Land Office." [148]

A true copy from the printed record in Lane vs. Watts.

G. H. GREVILLIER,
Attorney for Defendant Herein.

[Endorsed]: Defendant's Exhibit No. 10, Being the Exhibit Referred to in the Second Paragraph on Page 3 of Statement in Narrative Form of the

Evidence and Proceedings in this Trial, Filed February 13, 1924. Said Exhibit 10, Filed as a Part of this Record, Feb. 13, 1924, by Direction of the Court.

C. R. McFALL,
Clerk U. S. Dist. Court, Dist. of Ariz. [149]

Defendants' Exhibit No. 11.

In the United States District Court for the District of Arizona.

No. 107—AT LAW—(Tucson).

JAMES E. BOULDIN et al.,

Plaintiffs,

against

ALTO MINES COMPANY et al.,

Defendants.

Extract from the answer, filed July 22, 1909, of the Commissioner of the General Land Office and the Secretary of the Interior to Section 18 of the Bill in Lane vs. Watts, and which extract is found on page 36 of the printed record in that case, and is referred to on page 22 of the stenographer's transcript of proceedings herein:

> "These defendants admit, however, that a survey of that tract now in question was made in 1905 and that the plat and survey were examined and approved as strictly conformable to the field notes of the survey, but the circumstances leading to and connected with such survey will be more fully set out hereinafter."

A true copy from the printed record in Lane vs. Watts.

G. H. BREVILLIER,
Attorney for Defendant Herein.

Defendant's Exhibit No. 11, being the exhibit referred to in the second paragraph on page 3 of Statement in Narrative Form of the Evidence and Proceedings in this trial, filed February 13, 1924. Said Exhibit 11, filed as a part of this record, Feb. 13, 1924, by direction of the Court.

C. R. McFALL,
Clerk U. S. Dist. Court, Dist. of Arizona. [150]

Defendants' Exhibit No. 12.

In the United States District Court for the District of Arizona.

No. 107—AT LAW—(Tucson).

JAMES E. BOULDIN et al.,
Plaintiffs,
against
ALTO MINES COMPANY et al.,
Defendants.

Certificate attached to the plat of the Contzen survey, as found on page 255 of the printed record in Lane vs. Watts, and referred to on page 22 of the stenographer's transcript of proceedings herein:

"Department of the Interior,
General Land Office,
Washington, D. C., January 12, 1909.

I hereby certify that the annexed tracing of the

plat of survey of the location of Baca Float No. 3, Arizona, approved by the Surveyor General of Arizona, November 23, 1906, and the annexed copy of the report of the Surveyor General of Arizona to the Commissioner of the General Land Office, dated November 5, 1906, on the validity of said location, are true and literal exemplifications of the originals thereof on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] H. W. SANFORD,

Recorder of the General Land Office."

A true copy from the printed record in Lane vs. Watts.

G. H. BREVILLIER,

Attorney for Defendant Herein.

Defendant's Exhibit No. 12, being the exhibit referred to in the second paragraph on page 3 of Statement in Narrative Form of the Evidence and Proceedings in this trial, filed February 13, 1924, Said Exhibit 12, filed as a part of this record, Feb. 13, 1924, by direction of the Court.

C. R. McFALL,

Clerk U. S. Dist. Court, Dist. of Arizona. [151]

In the District Court of the United States for the District of Arizona, Sitting at Tucson.

No. L.–107—Tucson.

JAMES E. BOULDIN, DAVID W. BOULDIN, HELEN L. BOULDIN and WELDON M. BAILEY,

Plaintiffs,

vs.

THE ALTO MINES COMPANY, a Corporation Organized Under the Laws of the State of Arizona, The Alto Copper Company, a Corporation Organized Under the Laws of the State of Maine, The Santa Cruz Mines and Smelter Company, a Corporation Organized Under the Laws of the State of Arizona, The Consolidated Mines, Smelter and Transportation Company, a Corporation Organized Under the Laws of the State of Delaware, Albert Steinfeld, Henry S. Guerrin, John Doe, Richard Roe, Henry Roe, James Doe, James Roe, Arthur Doe and Arthur Roe,

Defendants.

Statement in Narrative Form of the Evidence and Proceedings in the District Court for the District of Arizona in Above-entitled Cause.

It was stipulated that a statement of the title signed by counsel for all parties present or represented at the trial, setting out the title of the plaintiffs down to April, 1915, should be filed, and

considered in order to avoid the necessity of offering all the deeds to the tract of land known as Baca Float No. 3, said statement to stand in place of original deeds with the same force and effect as the original papers therein recited.

Plaintiffs' Exhibit 1 offered and received in evidence, and it is stipulated to be a correct map of the Alto Group of Mines marked Exhibit 1.

Thereupon the plaintiffs rested.

The defendant the Alto Mines Company offered various documents, which were received in evidence marked and filed with the papers of said cause as Defendant's Exhibits 1, 2, 3, 4, 5, 6, 7, 8 and 9.

It was stipulated that uncertified copies of the various [152] documents offered in evidence might be received with the same force and effect as if they were duly certified.

It was stipulated that Mr. Weldon M. Bailey, who was then and there the attorney for the plaintiffs in this action, attended the tax sale and made no objection thereto.

It was stipulated that the Alto Mines Company is a corporation duly organized and existing under the laws of Arizona.

Whereupon the defendant rested.

The plaintiffs' case in rebuttal.

It was stipulated between counsel that the decree in the case of Lane against Watts in the Supreme Court of the United States directed the filing of a survey of Baca Location No. 3, and that that was done some time early in the month of December, 1914.

Plaintiffs' Exhibits 2, 3 and 4 offered and received in evidence.

Mr. Brevellier, attorney for the Alto Mines Company, a corporation, stated that the officers of the Santa Cruz Development Company on June 29, 1914, were as follows:

James W. Vroom, President:
Daniel G. Curtis, Vice-president;
G. H. Brevellier and either
Mr. Brevellier or his stenographer, Secretary.

The stock of the Santa Cruz Development Company then and at all times has been held as follows:

James W. Vroom owns one-half, and the remaining one-half is divided among four persons: Mr. Curtis, Doctor J. A. Root, G. H. Brevellier, and a man named Collins.

The stock of the Alto Mines Company was divided equally between Doctor Root, Mr. Curtis and G. H. Brevellier, and its officers were Doctor Root, president; Mr. Curtis, vice-president, [153] G. H. Brevellier, I think, was treasurer, and either Mr. Brevellier or his stenographer was secretary.

The conveyance made by the Santa Cruz Development Company was in accordance with an arrangement made by James W. Vroom with the Santa Cruz Development Company, that it would cause forthwith whatever title it had to be conveyed to the Alto Group of mines to G. H. Brevellier or his nominee for the benefit of the persons interested in the Alto Mining Company.

The defendant, The Alto Mines Company, then introduced in evidence Section 18 of the bill in

equity, in the case of Lane vs. Watts, filed December 11, 1908, and an extract from the answer of the Commissioner of the General Land Office, and the Secretary of the Interior to Section 18 of the bill in Lane vs. Watts, filed July 22, 1909, and also page 255 of said record being the certificate attached to the plat of the Contzen Survey to the report of the Surveyor-General of Arizona in connection therewith, by reading from the printed abstract of record in said case, which were received in evidence with the understanding that copies of the portions thereof introduced in evidence should be substituted therefor and filed with the Clerk.

The defendant, The Alto Mines Company, then introduced in evidence a plat of the Contzen Survey of Baca Float No. 3 approved and filed in the office of the United States Surveyor General of Arizona on November 23, 1906, the same being a certified copy of the plat which was on file in the records of said court in another case. The Court stated that the plat would be considered, but would not be withdrawn from the files in the other case, and Mr. Brevellier, one of the attorneys for the defendant, agreed to furnish another copy on request of the Clerk of the Court. The extracts from the record in the case [154] of Lane vs. Watts, and the additional copy of the plat of the Contzen Survey were furnished later and are now on file in the Clerk's office.

It is stipulated that Daisy Belle Bouldin died in 1907. She and James E. Bouldin were married

in Texas and lived in Texas for at least five years after their marriage.

It is stipulated that Mr. Weldon M. Bailey is and was at all times mentioned a citizen of the State of Texas; and it is further stipulated that the value of the property in controversy is and has been at all times herein mentioned over $3,000.00.

Approved:

JOHN H. CAMPBELL,
SAMUEL L. KINGAN,
A. R. CONNER,
Attorneys for Plaintiffs.
BEN C. HILL,
Attorney for Defendant The Alto Mines Company.

The foregoing statement of the evidence and of the proceedings had on the trial of the above-entitled cause is approved this 13th day of February, 1924.

WM. H. SAWTELLE,
Judge.

[Endorsed]: Filed Feb. 13, 1924. C. R. McFall, Clerk. By Agnes Borrego, Deputy Clerk. [155]

In the United States District Court for the District of Arizona.

No. L.–107—(Tucson).

JAMES E. BOULDIN, DAVID W. BOULDIN, HELEN L. BOULDIN and WELDON M. BAILEY,

Plaintiffs,

vs.

THE ALTO MINES COMPANY, a Corporation Organized Under the Laws of the State of Arizona, The Alto Copper Company, a Corporation Organized Under the Laws of the State of Maine, The Santa Cruz Mines and Smelter Company, a Corporation Organized Under the Laws of the State of Arizona, The Consolidated Mines, Smelter and Transportation Company, a Corporation Organized Under the Laws of the State of Delaware, Albert Steinfeld, Henry F. Guerin, John Doe, Richard Roe, Henry Roe, James Doe, James Roe, Arthur Doe and Arthur Roe,

Defendants.

Motion for New Trial.

Come now the plaintiffs and move the Court to set aside the judgment heretofore entered herein and to grant a new trial for the following reasons:

I.

That the Court erred in holding that the property described in the plaintiff's complaint or any

portion thereof was subject to taxation prior to 1914 when it was segregated from the public domain.

II.

That the Court erred in holding and deciding that the judgment of the Superior Court of the county of Santa Cruz foreclosing a lien for taxes for the years 1910, 1911, and 1912, was a valid judgment against the plaintiffs herein and that the sale made thereunder is a valid sale and that said judgment and said sale may not be collaterally attacked.

III.

That the Court erred in holding and deciding that the one-half interest in the property owned by Daisy Belle Bouldin at [156] the time of her death in 1908 and which descended to her children, Helen L. Bouldin and David W. Bouldin, was affected by said judgment of said Superior Court of Santa Cruz County or by the sale made thereunder, for the reasons that at the time of the institution of said suit in said Superior Court Daisy Belle Bouldin was dead and her heirs, Helen L. Bouldin and David W. Bouldin were not parties to said action.

IV.

That the judgment entered herein does not describe the property which the Court holds and decides is the property of the defendant the Alto Mines Company.

This motion is based upon the pleadings, papers on file, and upon the minutes of the court including the reports, transcript of shorthand notes and such

notes and memoranda as may have been kept by the Judge.

WELDON M. BAILEY,
JOHN H. CAMPBELL,
Attorneys for Plaintiffs.

[Endorsed]: Service by copy accepted this —— day of February, 1923.

BEN C. HILL,
Attorney for Defendants.

Filed Feb. 26, 1923. C. R. McFall, Clerk. In the United States District Court for the District of Arizona. By Earl T. Cox, Deputy Clerk. [157]

In the United States District Court for the District of Arizona.

No. L.-107—(Tucson).

JAMES E. BOULDIN, DAVID W. BOULDIN, HELEN L. BOULDIN and WELDON M. BAILEY,

Plaintiffs,

vs.

THE ALTO MINES COMPANY, a Corporation Organized Under the Laws of the State of Arizona, The Alto Copper Company, a Corporation Organized Under the Laws of the State of Maine, The Santa Cruz Mines and Smelter Company, a Corporation Organized Under the Laws of the State of Arizona, The Consolidated Mines, Smelter and Transpor-

tation Company, a Corporation Organized Under the Laws of the State of Delaware, Albert Steinfeld, Henry F. Guerin, John Doe, Richard Roe, Henry Roe, James Doe, James Roe, Arthur Doe and Arthur Roe,

Defendants.

Amended Motion for New Trial.

Come now the plaintiffs and move the Court to set aside the judgment heretofore entered herein and to grant a new trial for the following reasons:

I.

That the Court erred in holding that the property described in the plaintiff's complaint or any portion thereof was subject to taxes prior to the year 1914 when it was segregated from the public domain; that prior to the year 1914 said property had not been segregated from the public domain of the United States and the taxation thereof was not authorized by and was contrary to the Constitution and laws of the United States, and the judgment rendered herein is not authorized by but is contrary to the Constitution and laws of the United States.

II.

That the Court erred in holding and deciding that the judgment of the Superior Court of the County of Santa Cruz foreclosing a lien for taxes for the years 1910, 1911 and 1912 was a valid judgment against the plaintiffs herein and that the sale made thereunder is a valid sale and that said judgment and said sale may not be collaterally attacked. [158]

III.

That the Court erred in holding and deciding that the one-half interest in the property owned by Daisy Belle Bouldin at the time of her death in 1908 and which descended to her children, Helen L. Bouldin and David W. Bouldin, was affected by said judgment of said Superior Court of Santa Cruz County or by the sale made thereunder, for the reasons that at the time of the institution of said suit in said Superior Court Daisy Belle Bouldin was dead and her heirs, Helen L. Bouldin and David W. Bouldin were not parties to said action.

IV.

That the judgment entered herein does not describe the property which the Court holds and decides is the property of the defendant the Alto Mines Company.

This motion is based upon the pleadings, papers on file, and upon the minutes of the court including the reports, transcript of the shorthand notes and such notes and memoranda as may have been kept by the Judge.

W. M. BAILEY,
KINGAN, CAMPBELL & O'CONNOR,
Attorneys for Plaintiffs.

[Endorsed]: Received copy March 28th, 1923.
BEN C. HILL,
Attorney for Alto Mines Co., Defendant.

Filed Mar. 28, 1923. C. R. McFall, Clerk. United States District Court for the District of Arizona. By Earl T. Cox, Deputy. [159]

November, 1922, Term—Tucson.

In the United States District Court for the District of Arizona.

Hon. WILLIAM H. SAWTELLE, United States District Judge, Presiding.

Minute Entry of April 2, 1923.

No. L.-107—(Tucson).

JAMES E. BOULDIN, DAVID W. BOULDIN, HELEN L. BOULDIN and WELDON M. BAILEY,

Plaintiffs,

vs.

ALTO MINES COMPANY, a Corporation, et al.,

Defendants.

Minutes of Court—April 2, 1923—Order Continuing Hearing of Motion for New Trial.

IT IS ORDERED THAT HEARING on plaintiff's motion for new trial be passed until April 3, 1923.

Minute Entry of April 3, 1923.

JAMES E. BOULDIN, DAVID W. BOULDIN, HELEN L. BOULDIN and WELDON M. BAILEY,

Plaintiffs,

vs.

THE ALTO MINES COMPANY, a Corporation, The Alto Copper Company, a Corporation,

The Santa Cruz Mines & Smelter Co., a Corporation, Albert Steinfeld, Henry F. Guerin, John Doe, Richard Roe, Henry Roe, James Doe, James Roe, Arthur Doe, and Arthur Roe,

Defendants.

Minutes of Court—April 3, 1923—Order Submitting Motion for New Trial.

The plaintiffs' motion for new trial comes on regularly for hearing this date. J. H. Campbell, Esquire, is present for the plaintiffs, and Ben C. Hill, Esquire, for defendant The Alto Mines Company.

The motion is argued by counsel and submitted to the Court, and by the Court taken under advisement. [160]

May, 1923, Term—Tucson Division.

In the United States District Court for the District of Arizona.

Honorable WILLIAM H. SAWTELLE, United States District Judge, Presiding.

Minute Entry of September 11, 1923.

L.–107—(Tucson.).

JAMES E. BOULDIN et al.,

Plaintiffs,

vs.

ALTO MINES COMPANY et al.,

Defendants.

Minutes of Court—September 11, 1923—Order Overruling Motion for New Trial.

Plaintiffs' motion for new trial having been submitted and taken under advisement, and the Court having fully considered the same, does now ORDER that same be, and is hereby overruled. [161]

May, 1923, Term—Tucson Division.

In the United States District Court for the District of Arizona.

Honorable WILLIAM H. SAWTELLE, United States District Judge, Presiding.

Minute Entry of September 22, 1923.

JAMES E. BOULDIN, DAVID W. BOULDIN, HELEN L. BOULDIN and WELDON M. BAILEY,

Plaintiffs,

vs.

THE ALTO MINES COMPANY, a Corporation Organized Under the Laws of the State of Arizona, The Alto Copper Company, a Corporation Organized Under the Laws of the State of Maine, The Santa Cruz Mines and Smelter Company, a Corporation Organized Under the Laws of the State of Arizona, The Consolidated Mines, Smelter and Transportation Company, a Corporation Organized Under the Laws of the State of Dela-

ware, Albert Steinfeld, Henry F. Guerin, John Doe, Richard Roe, Henry Roe, James Doe, James Roe, Arthur Doe and Arthur Roe,

Defendants.

Minutes of Court—September 22, 1923—Judgment Nunc Pro Tunc.

The above-entitled action came on regularly for trial on the 4th and 5th days of November, 1919, John H. Campbell, Esquire, and Weldon M. Bailey, Esquire, appearing as counsel for the plaintiffs, and G. H. Brevillier, Esquire, and Ben C. Hill, Esquire, appearing as counsel for the defendant, Alto Mines Company, and none of the other defendants appearing either in person or by counsel; and, a trial by jury having been expressly waived by counsel for the respective parties, the case was tried before the Court sitting without a jury; and, evidence having been introduced by each of the respective parties, the case was submitted for decision; and the Court having considered the same, and being fully advised, judgment is now rendered in favor of the defendant, Alto Mines Company, and against the plaintiffs;

NOW, THEREFORE, by reason of the law, IT IS ORDERED, ADJUDGED and DECREED that the plaintiffs take nothing by this action, and that [162] the defendant, Alto Mines Company, a corporation, do have and recover judgment against said plaintiffs as to that part of the whole property described in plaintiffs' complaint herein, particularly described as follows, to wit:

All of those certain pieces or parcels of the demanded premises, being:

All those certain mines, mining claims, mining properties and the land covered thereby, with the appurtenances, situate, lying and being in the Tyndall Mining District, County of Santa Cruz, State of Arizona, as follows, to wit:

OPHIR No. 2, the location notice of which is recorded in Book 5 of Mining Locations, at page 189;

OPHIR No. 1, the location notice of which is recorded in Book 5 of Mining Locations, at page 188;

EXCELSIOR, the location notice of which is recorded in Book 1 of Mining Locations, at page 85;

EXCELSIOR WEST, the location notice of which is recorded in Book 1 of Mining Locations, at page 93;

BUENA VISTA, the location notice of which is recorded in Book 1 of Mining Locations, at page 86;

HILLSIDE, the location notice of which is recorded in Book 2 of Mining Locations, at page 160;

DONAU, the location notice of which is recorded in Book 1 of Mining Locations, at page 88;

GREAT EASTERN, the location notice of which is recorded in Book 2 of Mining Locations, at page 162;

GRAND PRIZE, the location notice of which is recorded in Book 1 of Mining Locations, at page 84;

ALTO EAST, the location notice of which is recorded in Book 1 of Mining Locations, at page 82;

Also all that part and parcel of the STEINFELD WEST, ALBERT, STEINFELD, ALTO, ALBIAN and RECORD, which lies south of the north boundary of Baca Float No. 3, as selected on June 17th, 1863, under and pursuant to an act of Congress approved June 21st, 1860, as said line is now fixed and established by the survey of Philip Contzen, Deputy Mineral Surveyor, made in the year 1905.

The location notices of said respective claims last mentioned, are recorded as follows: STEINFELD WEST, the location notice of which is recorded in Book 1 of Mining Locations, at page 80; ALBERT, the location notice of which is recorded in Book 1 of Mining Locations, at page 58; STEINFELD, the location notice of which is recorded in Book 1 of Mining Locations, at page 56; ALTO, the location notice of which is recorded in Book 1 of Mining Locations, at page 81; ALBIAN, the location notice of which is recorded in Book 1 of Mining Locations, at page 54, and the RECORD, the location notice of which is recorded in Book 5 of Mining Locations, at page 191. The book and page references hereinabove made, are to the books in the County Recorder's office of Santa Cruz County;

—and for its costs *w*herein taxed at $71.00.

WHEREAS, the judgment heretofore entered on the 19th day of February, 1923, is in favor of the defendants instead of the defendant Alto Mines Company, no other defendant having answered, and [163]

WHEREAS, said judgment fails to describe that part of the entire property claimed by the plaintiffs for which the said defendant Alto Mines Company is entitled to judgment,

NOW, THEREFORE, IT IS ORDERED, that this judgment be and the same is hereby entered as of the 19th day of February, 1923, in substitution for the judgment heretofore entered on said date. [164]

In the District Court of the United States for the District of Arizona.

No. L.–107—Tucson.

JAMES E. BOULDIN et al.,

Plaintiffs,

vs.

ALTO MINES COMPANY et al.,

Defendants.

Memorandum Opinion.

This is an action in ejectment to recover that portion of the Alto Group of Mines located within the boundaries of the Baca Float in Santa Cruz County, Arizona.

At the time the mining claims were located, it was supposed that the same were upon the public domain and subject to location. The history of the mines and the development and operation of the same as well as the history of the Baca Float is familiar to all of us. Many years after the mines ceased operations and after the boundaries of the Baca Float had been located and established, it was ascertained that the greater and most valuable portions of the mining claims were located within the boundaries of the Baca Float, and only a few years ago, the title to the said Float was confirmed in said plaintiffs and their grantors. During the progress of the litigation among claimants of the Baca Float, the mining claims were assessed for taxes, and the taxes not being paid, were, by the Superior Court of Santa Cruz County, Arizona, ordered sold and were sold for such taxes, and at said sale the defendants herein became the purchasers, paying therefor three or four thousand dollars.

Plaintiffs have established a perfect title to the property up to the time of the sale above mentioned and the real controversy raised here is the validity of that sale. Plaintiffs contend that at the time the property was assessed for taxes, it

had not been segregated from the public domain, and therefore was not subject to taxation. I must confess that I, myself, entertained grave doubts as to whether it was subject to taxation by the State of Arizona prior to the year 1914, but in a similar case involving the same question regarding other portions of the Baca Float, the Supreme Court of Arizona held that other portions of the Float [165] were subject to taxation, and I feel bound by that decision; the same being a construction of an Arizona statute by the Arizona Supreme Court.

There are other questions raised by the pleadings but I do not believe that the validity of the tax sale can be collaterally attacked in this proceeding, and in my opinion, the judgment of the Superior Court of Santa Cruz County was a valid judgment, binding upon all the parties thereto, and especially inasmuch as it is conceded that the attorney for the plaintiffs herein was present at the sale and made no objection thereto.

Judgment will be entered for defendants.

[Endorsed]: Filed Feb. 27, 1923. C. R. McFall, Clerk. United States District Court, for the District of Arizona. By Earl T. Cox, Deputy. [166]

In the District Court of the United States for the District of Arizona, Sitting at Tucson.

No. L.–107—Tucson.

JAMES E. BOULDIN, DAVID W. BOULDIN, HELEN L. BOULDIN and WELDON M. BAILEY,

Plaintiffs,

vs.

THE ALTO MINES COMPANY, a Corporation Organized Under the Laws of the State of Arizona, The Alto Copper Company, a Corporation Organized Under the Laws of the State of Maine, The Santa Cruz Mines and Smelter Company, a Corporation Organized Under the Laws of the State of Arizona, The Consolidated Mines, Smelter and Transportation Company, a Corporation Organized Under the Laws of the State of Delaware, Albert Steinfeld, Henry F. Guerin, John Doe, Richard Roe, Henry Roe, James Doe, James Roe, Arthur Doe and Arthur Roe,

Defendants.

Petition for Writ of Error.

To the Honorable WILLIAM H. SAWTELLE, Judge of the District Court Aforesaid:

Now come James E. Bouldin, David W. Bouldin, Helen L. Bransford (formerly Helen L. Bouldin) and Weldon M. Bailey, by their attor-

neys, and respectfully show that on the 19th day of February, 1923, a final judgment was entered against your petitioners, plaintiffs James E. Bouldin, David W. Bouldin, Helen L. Bouldin and Weldon M. Bailey, and in favor of the Alto Mines Company, a corporation, and a motion for a new trial was denied by order entered on the 11th day of September, 1923.

Your petitioners feeling themselves aggrieved by the said judgment and the said order as aforesaid, herewith petition the Court for an order allowing them to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit under the laws of the United States in such cases made and provided. [167]

WHEREFORE, premises considered, your petitioners pray that a writ of error do issue; that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid sitting at San Francisco, California, in said circuit, for the correction of the errors complained of and herewith assigned, be allowed; and that an order be made fixing the amount of the security to be given by plaintiffs in error conditioned as the law directs and upon giving such bond as may be required that all further proceedings may be suspended until the determination of said writ of error by said Circuit Court of Appeals.

SAMUEL L. KINGAN,
JOHN H. CAMPBELL,
A. R. CONNER,
Attorneys for Petitioners in Error.

[Endorsed]: Filed Feb. 8, 1924. C. R. McFall, Clerk. [168]

In the District Court of the United States for the District of Arizona, Sitting at Tucson.

No. L.–107—Tucson.

JAMES E. BOULDIN, DAVID W. BOULDIN, HELEN L. BOULDIN and WELDON M. BAILEY,

Plaintiffs,

vs.

THE ALTO MINES COMPANY, a Corporation Organized Under the Laws of the State of Arizona, The Alto Copper Company, a Corporation Organized Under the Laws of the State of Maine, The Santa Cruz Mines and Smelter Company, a Corporation Organized Under the Laws of the State of Arizona, The Consolidated Mines, Smelter and Transportation Company, a Corporation Organized Under the Laws of the State of Delaware, Albert Steinfeld, Henry S. Guerrin, John Doe, Richard Roe, Henry Roe, James Doe, James Roe, Arthur Doe and Arthur Roe,

Defendants.

Writ of Error (Copy).

The President of the United States to the Honorable WILLIAM H. SAWTELLE, Judge of the District Court of the United States for the District of Arizona, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you between James E. Bouldin, David W. Bouldin, Helen L. Bransford (formerly Bouldin) and Weldon M. Bailey, plaintiffs in error, and The Alto Mines Company, a corporation, defendant in error, a manifest error has happened to the damage of James E. Bouldin, David W. Bouldin, Helen L. Bransford (formerly Bouldin) and Weldon M. Bailey, plaintiffs in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things [169] concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the State of California, where said court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Court of Appeals may cause further to be done

therein to correct the error what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this the 8th day of February, A. D. 1924.

C. R. McFALL,
Clerk of the United States District Court for the District of Arizona.

Allowed this the 8th day of February A. D. 1924.

WM. H. SAWTELLE,
United States Judge.

[Endorsed]: Filed Feb. 8, 1924. C. R. McFall, Clerk, United States District Court, for the District of Arizona. [170]

In the District Court of the United States for the District of Arizona, Sitting at Tucson.

No. L.–107—Tucson.

JAMES E. BOULDIN, DAVID W. BOULDIN, HELEN L. BOULDIN and WELDON M. BAILEY,

Plaintiffs,

vs.

THE ALTO MINES COMPANY, a Corporation Organized Under the Laws of the State of Arizona, The Alto Copper Company, a Corporation Organized Under the Laws of the State of Maine, The Santa Cruz Mines and

Smelter Company, a Corporation Organized Under the Laws of the State of Arizona, The Consolidated Mines, Smelter and Transportation Company, a Corporation Organized Under the Laws of the State of Delaware, Albert Steinfeld, Henry S. Guerrin, John Doe, Richard Roe, Henry Roe, James Doe, James Roe, Arthur Doe and Arthur Roe,

Defendants.

Order Granting Writ of Error.

The petition of James E. Bouldin, David W. Bouldin, Helen L. Bransford (formerly Bouldin) and Weldon M. Bailey for a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, California, in said Circuit, is hereby granted. Bond is fixed at one thousand dollars ($1,000.00) to be conditioned as the law directs, and all proceedings in said cause are hereby stayed until the determination of the writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 8th day of February, 1924.

WM. H. SAWTELLE,

Judge.

[Endorsed on back]: Filed Feb. 8, 1924. C. R. McFall, Clerk, United States District Court for the District of Arizona. [171]

In the District Court of the United States for the District of Arizona, Sitting at Tucson.

No. L.–107—Tucson.

JAMES E. BOULDIN, DAVID W. BOULDIN, HELEN L. BOULDIN and WELDON M. BAILEY,

Plaintiffs,

vs.

THE ALTO MINES COMPANY, a Corporation, Organized Under the Laws of the State of Arizona, The Alto Copper Company, a Corporation Organized Under the Laws of the State of Maine, The Santa Cruz Mines and Smelter Company, a Corporation Organized Under the Laws of the State of Arizona, The Consolidated Mines, Smelter and Transportation Company, a Corporation Organized Under the Laws of the State of Delaware, Albert Steinfeld, Henry S. Guerrin, John Doe, Richard Roe, Henry Roe, James Doe, James Roe, Arthur Doe and Arthur Roe,

Defendants.

Assignment of Errors.

Come now James E. Bouldin, David W. Bouldin, Helen L. Bransford (formerly Helen L. Bouldin) and Weldon M. Bailey, plaintiffs in error in the above-numbered and entitled cause and in connection with their petition for a writ of error in this cause assign the following errors which

plaintiffs in error aver occurred in the trial thereof and upon which they rely to reverse the judgment rendered herein as appears of record:

1. That the Court erred in holding and deciding that the property described in the plaintiffs' complaint or any portion thereof was subject to taxation by the Territory of Arizona for any year prior to the year 1914, when it was segregated from the public domain, for the reason that prior to the year 1914 said property had not been segregated from the public domain of the United States and taxation thereof by the Territory of Arizona was not authorized, but was contrary to the Constitution and laws of the United States. [172]

2. That the Court erred in holding and deciding that the judgment of the Superior Court of the County of Santa Cruz, State of Arizona, foreclosing liens for taxes for the years 1910, 1911 and 1912 is a valid judgment against the plaintiffs herein and that the sale made thereunder is a valid sale and that that said judgment and said sale may not be collaterally attacked, for the reason that during all of the years for which said taxes were attempted to be levied said property was not subject to taxation by the Territory of Arizona, it not having been segregated from the public domain of the United States; and for the further reason that said taxes were purported to be levied against said property as mining claims which had been located upon public lands of the United States, while in fact said property and all thereof had, prior to said attempted location of said mining

claims, been granted by the United States and the title thereto had vested in the plaintiffs in error, or their grantors, although said lands had not been segregated from the public domain; and for the further reason that the judgment rendered in said Superior Court was and is invalid in the following particulars:

(a) The assessments for the year 1910 are to the Consolidated Mines, Smelter and Transportation Company, and for the year 1912 are to the Alto Copper Company, Albert Steinfeld and H. S. Guerrin, Receivers, and not to plaintiffs in error or their predecessors in title or to any of them.

(b) The descriptions in said assessments were of the mining locations such as are made on the vacant public mineral lands of the United States, and do not describe the lands of the plaintiffs in error or their predecessors in title as the same were granted by the United States, and are insufficient to give notice to the true owners. [173]

3. The Court erred in holding and deciding that the deed made by the Sheriff conveyed the title of the plaintiffs in error or their grantors, for the reason:

(a) The execution does not state the amount due for taxes and interest upon each of the so-called mining claims, and directs the Sheriff to levy upon and sell as under ordinary execution.

(b) The execution does not set forth the amount due upon each separate tract as is required by law. The Sheriff without right sold eight of the so-called mining claims in one lot for a lump sum, and not

separately, for the taxes found to be due upon each separate tract, thus preventing redemption of one without redeeming all.

(c) The levy was only upon mining claims and the sale conveyed no interest in the lands granted by the United States to the grantors of the plaintiffs in error, but only such interest, if any, as was obtained by attempted mineral locations.

(e) The purchase by the Alto Mines Company at the Sheriff's sale operated merely as payment of the taxes.

4. The Court erred in holding and deciding that the one-half interest in the property owned by Daisy Belle Bouldin at the time of her death and which descended to her children, Helen L. Bouldin and David W. Bouldin, was affected by said judgment of said Superior Court of Santa Cruz County, Arizona, or by the sale made thereunder, for the reason that at the time of institution of said suit in said Superior Court Daisy Belle Bouldin was dead and her heirs, Helen L. Bouldin and David W. Bouldin, were not parties to said action in said Superior Court.

5. That the Court erred in rendering judgment for the defendant in error Alto Mines Company and in not rendering judgment in favor of plaintiffs in error, for the reasons [174] heretofore stated.

WHEREFORE, plaintiffs in error pray that the judgment of said Court be reversed and that the Dis-

trict Court be directed to enter judgment in favor of plaintiffs in error.

SAMUEL L. KINGAN,
JOHN H. CAMPBELL,
ARCHIE R. CONNER,
Attorneys for Plaintiffs in Error.

Filed this —— day of February, A. D. 1924.

_____,
Clerk.

[Endorsed on back]: Filed Feb. 8, 1924. C. R. McFall, Clerk, United States District Court for the District of Arizona. [175]

In the District Court of the United States for the District of Arizona, Sitting at Tucson.

No. L.–107—Tucson.

JAMES E. BOULDIN, DAVID W. BOULDIN, HELEN L. BOULDIN and WELDON M. BAILEY,

Plaintiffs,

vs.

THE ALTO MINES COMPANY, a Corporation Organized Under the Laws of the State of Arizona, The Alto Copper Company, a Corporation Organized Under the Laws of the State of Maine, The Santa Cruz Mines and Smelter Company, a Corporation Organized Under the Laws of the State of Arizona, The

Consolidated Mines, Smelter and Transportation Company, a Corporation Organized Under the Laws of the State of Delaware, Albert Steinfeld, Henry S. Guerrin, John Doe, Richard Roe, Henry Roe, James Doe, James Roe, Arthur Doe and Arthur Roe,

Defendants.

Citation in Error (Copy).

The President of the United States to the Alto Mines Company, a Corporation, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be held in the city of San Francisco, State of California, thirty days from the date of this writ pursuant to a writ of error filed in the office of the clerk of the District Court of the United States for the District of Arizona, wherein James E. Bouldin, David W. Bouldin, Helen L. Bouldin (now Bransford) and Weldon M. Bailey are plaintiffs in error and the Alto Mines Company, a corporation, is defendant in error, to show cause, if any there be, why the judgment in such writ of error mentioned should not be corrected and speedy justice should not be done in their behalf.

WITNESS the Honorable WILLIAM H. SAWTELLE, Judge of the [176] District Court of the United States for the District of Arizona, this 8 day of February, 1924.

WM. H. SAWTELLE,

Judge.

[Seal] Attest: C. R. McFALL,

Clerk, U. S. Dist. Court, District of Arizona.

[Endorsed on back]: Service of the within citation and receipt of a copy thereof admitted this 8th day of February, 1924.

BEN C. HILL,
Attorney for Defendant in Error, The Alto Mines Company, a Corporation.

Filed Feb. 8, 1924. C. R. McFall, Clerk. United States District Court for the District of Arizona. By Agnes Borrego, Deputy Clerk. [177]

In the United States District Court for the District of Arizona.

No. L.–107—Tucson.

JAMES E. BOULDIN, DAVID W. BOULDIN, HELEN L. BOULDIN and WELDON M. BAILEY,

Plaintiffs,

vs.

THE ALTO MINES COMPANY, a Corporation Organized Under the Laws of the State of Arizona, The Alto Copper Company, a Corporation, Organized Under the Laws of the State of Maine, The Santa Cruz Mines and Smelter Company, a Corporation, Organized Under the Laws of the State of Arizona, The Consolidated Mines, Smelter and Transportation Company, a Corporation Organized Under the Laws of the State of Delaware, Albert Steinfeld, Henry F. Guerin, John Doe, Richard Roe, Henry Roe, James Doe, James Roe, Arthur Doe and Arthur Roe,

Defendants.

Writ of Error Bond.

KNOW ALL MEN BY THESE PRESENTS: That we, James E. Bouldin, David W. Bouldin, Helen L. Bransford (formerly Helen L. Bouldin), and Weldon M. Bailey, as principals, and Fidelity and Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto The Alto Mines Company, a corporation, in the full and just sum of $1000, to be paid to the said The Alto Mines Company, its attorneys, successors or assigns, for which payment well and truly to be made we bind ourselves, our successors, assigns, executors and administrators, jointly and severally, firmly by these presents.

Signed and dated this the 8th day of February, 1924.

WHEREAS, lately at a regular term of the District Court of the United States for the District of Arizona sitting at Tucson in said district, in a suit pending in said court between James E. Bouldin, David W. Bouldin, Helen L. Bouldin and Weldon M. Bailey as plaintiffs, and The Alto Mines Company as a defendant, cause No. L.–107—Tucson, on the law docket of said court, final [178] judgment was rendered against the said James E. Bouldin, David W. Bouldin, Helen L. Bouldin and Weldon M. Bailey for the recovery as against the plaintiffs in said action of certain pieces or parcels of real estate situated in Tyndal Mining District, Santa Cruz County, Arizona, described as the Ophir No. 2, Ophir No. 1, Excelsior, Excelsior West,

Buena Vista, Hillside, Donau, Great Eastern, Grand Prize, Alto East Mining Claims and portions of Steinfeld West, Albert, Steinfeld, Alto, Albian and Record mining claims, and for the recovery of its costs in the sum of $79.70, and the said James E. Bouldin, David W. Bouldin, Helen L. Bouldin and Weldon M. Bailey have obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment of said Court in the aforesaid suit, and a citation directed to the said The Alto Mines Company, a corporation, defendant in error, citing it to be and appear before the United States Circuit Court of Appeals for the Ninth District to be holden in San Francisco, in the State of California, according to law within thirty (30) days from the date hereof.

Now, the condition of the above obligation is such that if the said James E. Bouldin, David W. Bouldin, Helen L. Bouldin and Weldon M. Bailey shall prosecute their writ of error to effect and answer all damages and costs if they failed to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

JAMES E. BOULDIN,
DAVID W. BOULDIN,
By His Attorney in Fact,
JAMES E. BOULDIN.
HELEN L. BRANSFORD,
Formerly HELEN L. BOULDIN.
WELDON M. BAILEY. [179]
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation,
Surety.

[Corp. Seal] By JOHN W. McBRIDE,
Attorney-in-Fact.
By A. B. HAZELTINE,
Agent.

Approved this the 8 day of February, A. D. 1924.
WM. H. SAWTELLE,
Judge.

[Endorsed]: Filed Feb. 8, 1924. C. R. McFall, Clerk. [180]

In the District Court of the United States for the District of Arizona, Sitting at Tucson.

No. L.–107—Tucson.

JAMES E. BOULDIN, DAVID W. BOULDIN, HELEN L. BOULDIN and WELDON M. BAILEY,

Plaintiffs,

vs.

THE ALTO MINES COMPANY, a Corporation Organized Under the Laws of the State of Arizona, The Alto Copper Company, a Corporation, Organized Under the Laws of the State of Maine, The Santa Cruz Mines and Smelter Company, a Corporation, Organized Under the Laws of the State of Arizona, The Consolidated Mines, Smelter and Transportation Company, a Corporation Organized Under the Laws of the State of Delaware,

Albert Steinfeld, Henry S. Guerrin, John Doe, Richard Roe, Henry Roe, James Doe, James Roe, Arthur Doe and Arthur Roe,
Defendants.

Praecipe for Transcript of Record.

To the Clerk:

You are requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to appeal allowed in the above-entitled cause, and to include in such transcript of record the following and no other papers or exhibits, to wit:

1. Amended complaint.
2. Amended answer filed March 26, 1919.
3. Stipulation.
4. Order entering defaults.
5. Stipulation filed April 22, 1918.
6. Order of November 4, 1919.
7. Order of November 5, 1919.
8. Plaintiffs' Exhibit 2.
9. Plaintiffs' Exhibit 3.
10. Plaintiffs' Exhibit 4.
11. Statement of plaintiffs' title stipulated to be correct.
12. Defendants' Exhibit 1.
13. Defendants' Exhibit 3.
14. Defendants' Exhibit 4.
15. Defendants' Exhibit 5.
16. Defendants' Exhibit 6.
17. Defendants' Exhibit 7.
18. Defendants' Exhibit 8. [181]
19. Defendants' Exhibit 9.

20. Statement of testimony.
21. Judgment.
22. Motion for new trial.
23. Amended motion for new trial.
24. Order passing motion for new trial.
25. Order motion for new trial argued and submitted.
26. Order overruling motion for new trial.
27. Order entering judgment *nunc pro tunc.*
28. Opinion of Court.
29. Petition for writ of error.
30. Writ of error.
31. Order allowing writ of error.
32. Assignments of error.
33. Citation in error.
34. Bond on writ of error.
35. This praecipe.
36. Stipulation filed Feb. 8, 1924.

Respectfully,

SAMUEL L. KINGAN,
JOHN H. CAMPBELL,
A. R. CONNER,
Attorneys for Plaintiffs in Error.

Service of the foregoing praecipe acknowledged and a copy thereof accepted this 8th day of February, 1924.

BEN C. HILL,
Attorney for Defendant in Error The Alto Mines Company, a Corporation.

[Endorsed on back]: Filed Feb. 8, 1924. C. R. McFall, Clerk, United States District Court for

District of Arizona. By Agnes Borrego, Deputy Clerk. [182]

In the District Court of the United States for the District of Arizona, Sitting at Tucson.

No. L.–107—Tucson.

JAMES E. BOULDIN, DAVID W. BOULDIN, HELEN L. BOULDIN and WELDON M. BAILEY,

Plaintiffs,

vs.

THE ALTO MINES COMPANY, a Corporation Organized Under the Laws of the State of Arizona, The Alto Copper Company, a Corporation Organized Under the Laws of the State of Maine, The Santa Cruz Mines and Smelter Company, a Corporation Organized Under the Laws of the State of Arizona, The Consolidated Mines, Smelter and Transportation Company, a Corporation Organized Under the Laws of the State of Delaware, Albert Steinfeld, Henry S. Guerrin, John Doe, Richard Roe, Henry Roe, James Doe, James Roe, Arthur Doe and Arthur Roe,

Defendants.

Stipulation Re Statement in Narrative Form of Evidence and Proceedings in the District Court for the District of Arizona in Above-entitled Cause.

IT IS STIPULATED by and between respective counsel for the plaintiffs and the defendant The

Alto Mines Company that a statement in narrative form of the transcript of the proceedings now on file in the clerk's office of the District Court for the District of Arizona in the above-entitled cause may be prepared by counsel for the plaintiffs in error and filed with and made a part of the record to be submitted to the Circuit Court of Appeals for the Ninth Circuit in response to the writ of error this day granted in said cause. Said statement in narrative form shall be filed with the clerk of said District Court within ten days from the date hereof, and such additional statement as counsel for the defendant in error may desire may be filed within five days thereafter, and when so filed and approved by the Court shall become and be a part of the record.

Dated this 8th day of February, 1924.

SAMUEL L. KINGAN,
JOHN H. CAMPBELL,
A. R. CONNER,
Attorneys for Plaintiffs.
BEN C. HILL,
Attorney for Defendant in Error The Alto Mines Company.

[Endorsed]: Filed Feb. 8, 1924. C. R. McFall, Clerk. [183]

November, 1923, Term—Tucson Division.

In the United States District Court for the District of Arizona.

Honorable WM. H. SAWTELLE, United States District Judge, Presiding.

Minute Entry of February 8th, 1924.

No. 107–AT LAW—(Tucson).

JAMES E. BOULDIN et al.,

Plaintiffs,

vs.

ALTO MINES COMPANY et al.,

Defendants.

Minutes of Court—February 8, 1924—Order Directing Transmission of Plaintiffs' Exhibit No. 1 and Defendants' Exhibit No. 13.

Upon application of respective counsel for the parties to this cause, it is by the Court ordered that the Clerk of this court transmit to the Clerk of the United States Circuit Court of Appeals of the Ninth Circuit at San Francisco, California, Plaintiffs' Exhibit 1 and Defendants' Exhibit 13, which were introduced in evidence at the trial of said cause, in order that said original exhibits may be inspected by the said Circuit Court of Appeals upon the writ of error allowed herein and in connection with the transcript of the proceedings of this cause. [184]

November, 1923, Term—Tucson Division.

In the United States District Court for the District of Arizona.

Honorable WM. H. SAWTELLE, United States District Judge, Presiding.

Minute Entry of February 8th, 1924.

No. 107 -AT LAW—(Tucson).

JAMES E. BOULDIN et al.,

Plaintiffs,

vs.

ALTO MINES COMPANY et al.,

Defendants.

Minutes of Court—February 8, 1924—Certificate of Clerk U. S. District Court That Plaintiffs' Exhibit No. 1 and Defendants' Exhibit No. 13 are Identical.

Upon application of respective counsel for the parties to this cause, it is by the Court ordered that the clerk of this court transmit to the clerk of the United States Circuit Court of Appeals of the Ninth Circuit at San Francisco, California, Plaintiffs' Exhibit 1 and Defendants' Exhibit 13, which were introduced in evidence at the trial of said cause, in order that said original exhibits may be inspected by the said Circuit Court of Appeals upon the writ of error allowed herein and in connection with the transcript of the proceedings of this cause.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, clerk of the United States District Court for the District of Arizona, hereby certify that Plaintiffs' Exhibit 1 and Defendants' Exhibit 13 attached hereto (being maps and plats introduced at the trial of this cause), are the identical exhibits referred to in the foregoing order.

[Seal] C. R. McFALL,
Clerk U. S. District Court, District of Arizona.

[185]

In the District Court of the United States for the District of Arizona, Sitting at Tucson.

No. L.–107—Tucson.

JAMES E. BOULDIN, DAVID W. BOULDIN, HELEN L. BOULDIN and WELDON M. BAILEY,

Plaintiffs,

vs.

THE ALTO MINES COMPANY, a Corporation Organized Under the Laws of the State of Arizona, The Alto Copper Company, a Corporation Organized Under the Laws of the State of Maine, The Santa Cruz Mines and Smelter Company, a Corporation Organized Under the Laws of the State of Arizona, The Consolidated Mines, Smelter and Transportation Company, a Corporation Organized

Under the Laws of the State of Delaware, Albert Steinfeld, Henry S. Guerrin, John Doe, Richard Roe, Henry Roe, James Doe, James Roe, Arthur Doe and Arthur Roe.

Defendants.

Writ of Error (Original).

The President of the United States to the Honorable WILLIAM H. SAWTELLE, Judge of the District Court of the United States for the District of Arizona, GREETINGS:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you between James E. Bouldin, David W. Bouldin, Helen L. Bransford (formerly Bouldin) and Weldon M. Bailey, plaintiffs in error, and The Alto Mines Company, a corporation, defendant in error, a manifest error has happened to the damage of James E. Bouldin, David W. Bouldin, Helen L. Bransford (formerly Bouldin) and Weldon M. Bailey, plaintiffs in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speeedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the State of California, where said court is sitting, within thirty days from the date

hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Court of Appeals may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this the 8th day of February, A. D. 1924.

[Seal] C. R. McFALL,
Clerk of the United States District Court for the District of Arizona.

Allowed this the 8th day of February, A. D. 1924.

WM. H. SAWTELLE,
United States Judge.

[Endorsed]: No. L.–107—Tucson. In the District Court of the United States for the District of Arizona, Sitting at Tucson. James E. Bouldin et al., Plaintiffs, vs. The Alto Mines Company, a Corporation, et al., Defendants. Writ of Error. Filed Feb. 8, 1924. C. R. McFall, Clerk, United States District Court for the District of Arizona.

In the District Court of the United States for the District of Arizona, Sitting at Tucson.

No. L.–107—Tucson.

JAMES E. BOULDIN, DAVID W. BOULDIN, HELEN L. BOULDIN and WELDON M. BAILEY,

Plaintiffs,

vs.

THE ALTO MINES COMPANY, a Corporation Organized Under the Laws of the State of Arizona, The Alto Copper Company, a Corporation Organized Under the Laws of the State of Maine, The Santa Cruz Mines and Smelter Company, a Corporation Organized Under the Laws of the State of Arizona, The Consolidated Mines, Smelter and Transportation Company, a Corporation Organized Under the Laws of the State of Delaware, Albert Steinfeld, Henry S. Guerrin, John Doe, Richard Roe, Henry Roe, James Doe, James Roe, Arthur Doe and Arthur Roe,

Defendants.

Citation in Error (Original).

The President of the United States to the Alto Mines Company, a Corporation, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be held in the city of San Francisco, State of California, thirty days

from the date of this writ pursuant to a writ of error filed in the office of the clerk of the District Court of the United States for the District of Arizona, wherein James E. Bouldin, David W. Bouldin, Helen L. Bouldin (now Bransford) and Weldon M. Bailey are plaintiffs in error and the Alto Mines Company, a corporation, is defendant in error, to show cause, if any there be, why the judgment in such writ of error mentioned should not be corrected and speedy justice should not be done in their behalf.

WITNESS the Honorable WILLIAM H. SAWTELLE, Judge of the District Court of the United States for the District of Arizona, this 8th day of February, 1924.

WM. H. SAWTELLE,
Judge.

[Seal] Attest: C. R. McFALL,
Clerk U. S. Dist. Court, District of Arizona.

[Endorsed]: No. L.–107—Tucson. In the District Court of the United States for the District of Arizona, Sitting at Tucson. James E. Bouldin et al., Plaintiffs, vs. The Alto Mines Company, a Corporation, Defendants. Citation in Error. Filed Feb. 8, 1924. C. R. McFall, Clerk United States District Court for the District of Arizona. By Agnes Borrego, Deputy Clerk.

Service of the within citation and receipt of a copy thereof admitted this 8th day of February, 1924.

BEN C. HILL,
Attorney for Defendant in Error, The Alto Mines Company, a Corporation.

In the District Court of the United States for the District of Arizona.

JAMES E. BOULDIN, DAVID W. BOULDIN, HELEN L. BOULDIN (Now BRANSFORD), and WELDON M. BAILEY,

Plaintiffs in Error,

vs.

THE ALTO MINES COMPANY, a Corporation Organized Under the Laws of the State of Arizona,

Defendant in Error.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Arizona.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said United States District Court for the District of Arizona, including the records, papers and files in the case of James E. Bouldin, et al., plaintiffs, *versus* The Alto Mines Company, a corporation, et al., defendants; said case being number Law–107—Tucson, on the docket of said court.

I further certify that the foregoing 186 pages, numbered from 1 to 186, inclusive, contains a full, true and correct transcript of the proceedings in said case, and of all papers filed therein, together with the endorsements of filing thereon, as set forth

in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such clerk in the city of Tucson, state and district aforesaid.

I further certify that the original writ of error and citation issued in said action are attached hereto.

I further certify that the cost of preparing and certifying to said records amounts to the sum of $87.20, and that same has been paid in full by James E. Bouldin, et al., plaintiffs in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court at Tucson, in said district, this 1st day of March, in the year of our Lord one thousand nine hundred and twenty-four, and the year of our Independence the one hundred and forty-eight.

[Seal] C. R. McFALL,
Clerk of the United States District Court for the District of Arizona.

[Endorsed]: No. 4209. United States Circuit Court of Appeals for the Ninth Circuit. James E. Bouldin, David W. Bouldin, Helen L. Bouldin (Now Bransford), and Weldon M. Bailey, Plaintiffs in Error, vs. Alto Mines Company, a Corporation, Defendant in Error. Transcript of Record. Upon

Writ of Error to the United States District Court of the District of Arizona.

Filed March 3, 1924.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 4210

United States
Circuit Court of Appeals
For the Ninth Circuit.

RICHARD E. KING,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4210

United States
Circuit Court of Appeals
For the Ninth Circuit.

RICHARD E. KING,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

EDWARD H. CHAVELLE, Esq., Attorney for Plaintiff in Error,
315 Lyon Building, Seattle, Washington.

THOMAS P. REVELLE, Esq., United States Attorney, Attorney for Defendant in Error,
310 Federal Building, Seattle, Washington.

MATTHEW W. HILL, Esq., Assistant United States Attorney, Attorney for Defendant in Error,
310 Federal Building, Seattle, Washington. [1*]

United States District Court, Western District of Washington, Northern Division.

May, 1923, Term.

No. 7643.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

RICHARD E. KING,
Defendant.

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*Page-number appearing at foot of page of original certified Transcript of Record.

INDICTMENT.

Vio. Narcotic Drugs Import and Export Act.

United States of America,
Western District of Washington,
Northern Division,—ss.

The grand jurors of the United States of America, being duly selected, impaneled, sworn and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present:

COUNT I.

That RICHARD E. KING, on the sixteenth day of April, in the year of our Lord one thousand nine hundred twenty-three, at the city of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this District Court, then and there being, did then and there knowingly, wilfully, unlawfully, feloniously and fraudulently, and contrary to law import and bring into the United States from a foreign place to these grand jurors unknown, a certain quantity, to wit, two hundred eighty-eight (288) five-tael tins of a certain preparation of opium, to wit, opium prepared for smoking, a more particular description thereof being to these grand jurors unknown; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [2]

COUNT II.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That RICHARD E. KING, on the sixteenth day of April, in the year of our Lord one thousand nine hundred twenty-three, at the city of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Honorable Court, then and there being, did then and there knowingly, wilfully, unlawfully, feloniously and fraudulently buy, receive and conceal a certain quantity, to wit, two hundred eighty-eight (288) five-tael tins of a certain preparation of opium, to wit, opium prepared for smoking, a more particular description thereof being to these grand jurors unknown, said preparation of opium prepared for smoking theretofore having been knowingly, wilfully, unlawfully, feloniously, and fraudulently and contrary to law imported and brought from a foreign place to these grand jurors unknown into the United States, as he, the said RICHARD E. KING, at the time of said buying, receiving and concealing well knew; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THOS. P. REVELLE,
United States Attorney.
E. E. HUGHES,
Assistant United States Attorney.

A true bill.

PLINY L. ALLEN,
Foreman Grand Jury.

[Endorsed]: Presented to the Court by the Foreman of the Grand Jury in Open Court, in the Presence of the Grand Jury, and Filed in the U. S.

District Court, May 16, 1923. F. M. Harshberger, Clerk. [3]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7643.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD E. KING,

Defendant.

PETITION TO SUPPRESS EVIDENCE.

Comes now the defendant above named, and respectfully petitions and shows to the Court, as follows:

I.

That the defendant is under arrest for an alleged violation of the Harrison Drug Act, and a true bill has been returned by the grand jury for the Western District of Washington, Northern Division, charging the said defendant with certain offenses contrary to the provisions of said Act, and reference is hereby made to said indictment, and by such reference made a part of this petition; that the United States of America, and the United States District Attorney of this District, and the officers charged by law with the enforcement of the Harrison Drug Act, have in their possession and under their control certain property and effects which they intend to use as evidence against this defendant in this court

at the time of trial, unless the same be suppressed. That the said property and effects were illegally seized and are now unlawfully held, in the manner heretofore alleged, and the Government will attempt to use said effects and materials thus seized and will attempt to introduce testimony supported by and based upon said effects and materials secured by its illegal seizure, unless the same be suppressed; that the property seized, as petitioner is informed, consists of certain narcotics and a certain flashlight. [4]

II.

That all of said articles heretofore mentioned were illegally and unlawfully seized without due process of law, substantially under the following circumstances: That heretofore, to wit, on or about the 16th day of April, 1923, Officers Majewski and Joe Bianchi, city policemen, stopped the automobile of the petitioner, while he was driving along the highway known as Spokane Street, at the intersection of Spokane Street and Marginal Way, in a lawful and peaceful manner, and the said officers Majewski and Bianchi, without a search-warrant or any warrant, ordered the petitioner to stop his car by sticking a sawed-off shotgun into his body, and proceeded without the consent of your petitioner, and illegally and unlawfully, and without any warrant of law, to search said automobile, and while the defendant protested against said search, the said officers aforesaid proceeded to search the tonneau of said automobile and that there was in the tonneau of said car, securely wrapped in burlap, a

package, the contents of which were unknown to your petitioner, and that the said officers broke said package open, and examined into the contents of the same, and seized said package and the contents thereof, which had been placed in said automobile without the knowledge of your said petitioner, and thereafter called in A. B. Hamer, a revenue officer, and turned the said package over to him, and that no charge whatsoever was made against your petitioner by the said police officers for the violation of any law or ordinance of the State of Washington or the city of Seattle; but that thereafter, based upon said evidence claimed to have been secured by said unlawful search and seizure, the said defendant was arrested and detained, and that said search and seizure was unlawful and illegal for the following reasons:

a. That said search and seizure was unlawful for the [5] reason that the said officers making the search and seizure, failed and neglected to secure a search-warrant to search the automobile of your said petitioner, and at the time of said search and seizure your petitioner was proceeding in an orderly and lawful manner along the highways of the city of Seattle, without giving cause for his detention or arrest.

b. That the said officers Majewski and Bianchi were police officers of the city of Seattle, county of King, State of Washington, and were not Internal Revenue officers, nor officers authorized by law to search and seize, or arrest and detain, persons for violation of federal statutes, and that said officers

had no authority whatsoever to have searched the car of your said petitioner without a search-warrant therefor, nor to have seized any article in said car contained without a search-warrant, nor to use the same as evidence in the prosecution for the violation of a federal statute.

WHEREFORE your petitioner prays that an order be entered herein suppressing each and all of the said items and property mentioned in the foregoing petition, and suppressing the introduction of any evidence procured by or through the illegal search and seizure and that the United States of America be estopped from introducing such items as evidence against the defendant at the time of trial.

EDWARD H. CHAVELLE,
Attorney for Defendant.
315 Lyon Building, Seattle, Washington. [6]

United States of America,
Western District of Washington,—ss.

Richard E. King, being first duly sworn, on oath deposes and says: That he is the defendant named in the foregoing petition to suppress evidence; that he has read the same, knows the contents thereof, and believes the same to be true.

RICHARD E. KING.

Subscribed and sworn to before me this 23d day of May, 1923.

[Notary Seal] EDWARD H. CHAVELLE,
Notary Public in and for the State of Washington,
Residing at Seattle. [7]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7643.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD E. KING,

Defendant.

AFFIDAVIT OF RICHARD E. KING.

United States of America,
Western District of Washington,—ss.

Richard E. King, being first duly sworn, on oath deposes and says: That the search and seizure mentioned in the foregoing petition was made on the 16th day of April, 1923, while the defendant was driving his automobile along the highway known as Spokane Street, at the intersection of Spokane Street and Marginal Way, in a lawful and peaceful manner, when city police officers Majewski and Bianchi without a search-warrant or any warrant, ordered petitioner to stop his car, by sticking a sawed-off shotgun into his body, and proceeded without the consent of affiant, illegally and unlawfully, and without any warrant of law, to search said automobile, and while defendant protested against said search, the said officers aforesaid proceeded to search the tonneau of said automobile, and that there was in the tonneau of said car, se-

curely wrapped in burlap, a package, the contents of which were unknown to affiant, and that the said officers broke said package open, and examined into the contents of the same, and seized said package and the contents thereof, which had been placed in said automobile without the knowledge of affiant, and thereafter called in A. B. Hamer, a revenue officer, and turned the said package over to him, and that no charge whatsoever was made against affiant by the said police officers for the violation of any [8] ordinance or law of the city of Seattle or the State of Washington; but that thereafter, based upon said evidence claimed to have been secured by said unlawful search and seizure, and said defendant was arrested and detained and held to answer to the United States District Court for alleged violation of the Harrison Drug Act.

RICHARD E. KING.

Subscribed and sworn to before me this 23d day of May, 1923.

[Notarial Seal] EDWARD H. CHAVELLE,
Notary Public in and for the State of Washington,
Residing at Seattle.

Received a copy of the within petition to suppress this 4th day of June, 1923.

THOS. P. REVELEE,
H.R.
Attorney for ————.

[Endorsed]: Filed in the United States District Court. Western District of Washington, Northern Division. Jun. 4, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [9]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7643.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD E. KING,

Defendant.

HEARING ON PETITION TO SUPPRESS EVIDENCE.

Now on this 25th day of June, 1923, this cause comes on for hearing on petition to suppress evidence, which is argued and denied and exception allowed.

Journal 11, page 327. [10]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7643.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD E. KING,

Defendant.

AMENDED PETITION TO SUPPRESS EVIDENCE.

Comes now the defendant above named, and re-

spectfully petitions and shows to the Court as follows:

I.

That the defendant is now under arrest for an alleged violation of the Narcotic Drug Act, as of February 9, 1909, as amended by the Act of January 17, 1914, as amended by the Act of May 26, 1922; that a true bill has been returned by the grand jury for the Western District of Washington, Northern Division, charging the said defendant with certain offenses contrary to the provisions of said Act, and reference is hereby made to said indictment, and by such reference made a part of this petition; that the United States of America and the United States District Attorney of this district and the officers charged by law with the enforcement of said Act as amended, have in their possession and under their control, certain property and effects which they intend to use as evidence against this defendant in this court at the time of trial, unless the same be suppressed; that the said property and effects were illegally seized and are now unlawfully held, in the manner heretofore alleged, and the Government will attempt to introduce testimony supported by and based upon the said effects and property secured by its illegal search and seizure, unless the same be suppressed; that the property seized, as petitioner is informed and believes, consists of certain [11] narcotics, a flashlight, keys, lodge cards and other personal effects of the said defendant.

II.

That all of said articles hereinbefore mentioned, were illegally and unlawfully seized, without due process of law, substantially under the following circumstances: That heretofore, to wit, on the 16th day of April, 1923, a special agent of the United States Treasurer, A. B. Hamer, stopped the automobile of the petitioner, while he was driving along the highway known as Spokane Street, at the intersection of Spokane Street and Marginal Way; that the said petitioner was proceeding in a lawful and peaceful manner, and the curtains of said automobile were up, and that no one could see inside the tonneau of said car; that the said A. B. Hamer, without a search-warrant or any warrant, ordered the petitioner to stop his car, and proceeded without the consent of petitioner, and over his protest, and illegally and unlawfully and without any warrant of law, to search said automobile. While the defendant protested against said search, the officer aforesaid proceeded to search the tonneau of said car, and there was in the tonneau of said automobile, securely wrapped in burlap, a package, the contents of which were unknown to affiant; that thereafter the said officer raised the hood of said car, and claimed to have found thereunder, other packages, and that the said packages had been placed in the automobile without the knowledge of your petitioner; that thereafter, based upon said evidence claimed to have been secured by said unlawful search and seizure, said defendant was arrested and detained, and that said search and seiz-

ure were illegal and unlawful for the following reasons:

a. That said search and seizure were unlawful for the reason that the said officers making the search and seizure, failed and neglected to secure a search-warrant to search the automobile of [12] your petitioner, and at the time of said search and seizure, your petitioner was proceeding in an orderly and lawful manner along the highways of the city of Seattle, without giving cause for his detention and arrest.

WHEREFORE your petitioner prays that an order be entered herein, suppressing each and all of the said items and property mentioned in the foregoing petition, and suppressing the introduction of any evidence procured by or through the illegal search and seizure, and that the United States of America be estopped from introducing such items as evidence against the defendant at the time of trial.

EDWARD H. CHAVELLE,
Attorney for Defendant,
315 Lyon Building, Seattle, Washington.

United States of America,
Western District of Washington,—ss.

Richard E. King, being first duly sworn, on oath deposes and says: That he is the defendant in the above-entitled action; that he has read the foregoing amended petition to suppress evidence, knows the contents thereof, and that the facts therein stated are true and correct, as he verily believes.

RICHARD E. KING.

Subscribed and sworn to before me this 29th day of October, 1923.

[Notarial Seal] EDWARD H. CHAVELLE,
Notary Public in and for the State of Washington,
Residing at Seattle. [13]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7643.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD E. KING,

Defendant.

AFFIDAVIT OF RICHARD E. KING.

United States of America,
Western District of Washington,
County of King,—ss.

Richard E. King, being first duly sworn, on oath deposes and says: That the search and seizure mentioned in the foregoing petition, was made on the 16th day of April, 1923, while the defendant was driving his automobile along the highway known as Spokane Street, at the intersection of Spokane Street and Marginal Way, in a lawful and peaceful manner, when a special agent of the United States Treasury Department, located at Seattle, Washington, namely, A. B. Hamer, stopped the

said defendant's automobile without a search-warrant or any warrant, and proceeded without the consent of the affiant, illegally and unlawfully, and without any search-warrant or any warrant of law, to search said automobile, and while the defendant protested against said search, the said officer proceeded to search the said automobile, and there found a package, the contents of which were unknown to affiant, which was securely wrapped in burlap, in the tonneau of said car, and the said officer broke said package open, and examined the contents of the same; that there was another officer, whom the affiant believes to be John W. Majewski, with the said A. B. Hamer at said time and place; that they then raised the hood of the automobile, and found under the hood of the automobile, other packages, which had been placed in said automobile without the knowledge of [14] affiant; that no charge whatsoever was made against said affiant by the said officers, for the violation of any law or ordinance, but that thereafter, based upon said evidence claimed to have been secured by said unlawful search and seizure, the said affiant was arrested and detained, and held to answer to the United States District Court for the alleged violation of the Narcotic Drugs Act, and the regulations thereunder, being the act of February 9, 1909, as amended by the act of January 17, 1914, as amended by the act of May 26, 1922; that the reason for the making of this supplemental affidavit in support of the petition to suppress is that at the time of the making of the former affidavit, the affiant was not certain of the

names of the officers, until there was served upon him the affidavit of said A. B. Hamer, and he did not know that the said A. B. Hamer was the officer at whose instigation the said search was made; that said affidavit of said A. B. Hamer was verified on the 14th day of June, 1923, and was a part of the papers in opposition to the defendant's petition herein to suppress the evidence.

RICHARD E. KING.

Subscribed and sworn to before me this 29th day of October, 1923.

[Notarial Seal] EDWARD H. CHAVELLE,
Notary Public in and for the State of Washington,
Residing at Seattle.

Received a copy of the within petition this 30th day of Oct. 1923.

THOS. P. REVELLE,
Attorney for Govt.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 30, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [15]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7643.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD E. KING,

Defendant.

HEARING ON AMENDED PETITION TO SUPPRESS EVIDENCE.

Amended motion of defendant to suppress evidence was argued by both sides. Said motion was denied, exception allowed.

Journal 11, page 466. [16]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7643.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD E. KING,

Defendant.

ARRAIGNMENT AND PLEA.

Now on this 28th day of May, 1923, the above defendant comes into open court for arraignment

accompanied by his attorney E. H. Chavelle, and says that his true name is Richard E. King. Whereupon the reading of the information is waived and he here and now enters his plea of not guilty.

Journal 11, page 179. [17]

United States District Court, Western District of Washington, Northern Division.

No. 7643.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD E. KING,

Defendant.

AFFIDAVIT OF A. B. HAMER.

United States of America,
Western District of Washington,
Northern Division,—ss.

A. B. Hamer, being first duly sworn on his oath, deposes and says: That he is now, and at all times herein mentioned has been special agent of the United States Treasury Department located at Seattle, Washington; that affiant and John W. Majewski, city detective for the city of Seattle, having had reliable and positive information that Richard E. King, defendant above named, was engaged in the transportation and delivery of smoking opium and other narcotics, and that said defendant handled

large quantities of opium for certain Chinese of the city of Seattle, and defendant having passed west on Spokane Street in a Mitchell automobile to a point near the Fisher Flouring Mills early on the morning of April 16, 1923, affiant and said Majewski stationed themselves on Spokane Street near East Marginal Way, Seattle, Washington, where defendant would naturally pass on his way back to the city, and awaited defendant's return; that defendant approached said place about 3:50 o'clock A. M., April 16, 1923, driving a Mitchell automobile. Defendant was halted by affiant and said Majewski and immediately placed under arrest, and two hundred eighty-eight (288) five-tael tins of smoking opium contained in five (5) sacks were found by affiant and said Majewski in said automobile; three (3) sacks of which were [18] found on the floor of said car, and two (2) sacks of which were found under the hood of said car.

Affiant further states that he and said Majewski have had positive information for several months past that defendant was aiding certain Chinese in the transportation and disposition of narcotics, and usually employed in this work a Chandler automobile bought for him by Chinese in May, 1922; that on the morning in question defendant apparently fearing that the Chandler automobile was under observation, drove it down town and left it, securing a Mitchell car instead for the purpose of delivering said narcotics.

That affiant denies each and every allegation contained in the affidavit of Richard E. King in con-

flict with this affidavit, and especially denies that the contents of said sacks were unknown to defendant, the defendant having admitted immediately after his arrest that he knew said sacks contained smoking opium.

A. B. HAMER.

Subscribed and sworn to before me this 11th day of June, 1923.

[Seal U. S. District Court]

FRANK L. CROSBY, Jr.,

Dep. Clerk, U. S. Dist. Court, Western Dist. of Wash.

Copy rec'd.

EDWARD H. CHAVELLE,

Atty.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 20, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [19]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7643.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD E. KING,

Defendant.

VERDICT.

We, the jury in the above-entitled cause, find the defendant Richard E. King is guilty, as charged in Count I of the indictment herein; and further find the defendant Richard E. King is guilty, as charged in Count II of the indictment herein.

T. H. PIDDUCK,
Foreman.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 30, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

Journal 11, page 466. [20]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7643.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

RICHARD E. KING,
Defendant.

MOTION FOR NEW TRIAL.

Comes now the defendant, Richard E. King, and moves the Court to set aside the verdict of the jury heretofore entered herein, and grant a new trial, on the following grounds:

1. Error in law committed by the trial Court in refusing to grant the motion of the defendant to suppress the evidence.

2. That said verdict was against and contrary to law.

3. That said verdict was against and contrary to the evidence.

4. Insufficiency of the evidence to justify the verdict.

4. Errors of law occurring during the trial, and excepted to by the said defendant.

6. Refusal of the Court to grant motion of the defendant to dismiss Counts I and II of said indictment on the ground of the insufficiency of the evidence to sustain either count.

7. Error of the trial Court in refusing to direct a verdict for said defendant of not guilty.

8. Refusal of the Court to instruct the jury as requested by the instructions of the defendant.

Dated this 3d day of November, 1923.

EDWARD H. CHAVELLE,
Attorney for Defendant.

315 Lyon Building, Seattle, Washington. [21]

Due service of within motion for new trial admitted, and receipt of copy thereof acknowledged Nov. 3, 1923.

THOS. P. REVELLE,
U. S. District Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 3, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [22]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7643.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD E. KING,

Defendant.

MOTION IN ARREST OF JUDGMENT.

Comes now Richard E. King, the defendant in the above-entitled action, and moves the Court to arrest judgment and sentence herein, upon the ground and for the reason, among others:

1. That the evidence introduced at the trial was insufficient to sustain the verdict rendered herein.

2. That the motion to suppress the evidence by reason of the illegal and unlawful search and seizure was erroneously denied.

3. Variance between the indictment and proof introduced at the time of the trial.

Dated this 3d day of November, 1923.

EDWARD H. CHAVELLE,
Attorney for Defendant.
315 Lyon Building, Seattle, Washington.

Due service of within motion in arrest of judgment admitted, and receipt of copy thereof acknowledged, Nov. 3, 1923.

THOS. P. REVELLE,
U. S. District Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 3, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [23]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7643.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD E. KING,

Defendant.

HEARING ON MOTION FOR NEW TRIAL AND ARREST OF JUDGMENT.

Now on this 5th day of November, 1923, this cause comes on for hearing on motion for new trial and in arrest of judgment which was argued and both were denied, with exception allowed. Government moves for judgment and sentence. Sentence is passed at this time.

Journal No. 11, page 374. [24]

United States District Court, Western District of Washington, Northern Division.

No. 7643.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD E. KING,

Defendant.

SENTENCE.

Comes now on this 5th day of November, 1923, the said defendant Richard E. King into open court for sentence and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, and he nothing says save as he before hath said. Wherefore, by reason of the law and the premises, it is considered, ordered and adjudged by the Court that the defendant is guilty of violating the Narcotic Drugs Import and Export Act and that he be punished by being imprisoned in the United States Penitentiary at McNeil Island, Pierce County, Washington, or in such other place as may be hereafter provided for the imprisonment of offenders against the laws of the United States, for the term of six (6) years on each count of the indictment, terms to run concurrently at hard labor and to pay a fine of $50.00 on each of said counts I and II. And the said de-

fendant Richard E. King is now hereby ordered into the custody of the United States Marshal to carry this sentence into execution.

Judgment and Decree No. 3, page 494. [25]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7643.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD E. KING,

Defendant.

PETITION FOR WRIT OF ERROR.

Comes now the above-named defendant, Richard E. King, by his attorney and counsel, Edward H. Chavelle, and respectfully shows that on the 30th day of October, 1923, a jury empanelled in the above-entitled court and cause, returned a verdict finding said Richard E. King guilty of the indictment heretofore filed in the above-entitled court and cause, and thereafter, within the time limited by law, under rules and order of this court, defendant moved for a new trial, which motion was by the Court overruled, and exception thereto allowed, and likewise, within said time filed his motion for arrest of judgment, and which was by the Court overruled, and to which an exception was allowed; and thereafter, on the 5th day of November, 1923,

this defendant was by order and judgment and sentence in the above-entitled court in said cause sentenced.

And your petitioner, feeling himself aggrieved by this verdict, and the judgment and the sentence of the Court entered herein as aforesaid, and by the orders and rulings of said Court, and proceedings in said cause, now herewith petitions this Court for an order allowing him to prosecute a writ of error from said judgment and sentence, to the Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States, and in accordance with the procedure of said court made and provided, to the end that said proceedings as herein recited, and as more fully [26] set forth in the assignments of error presented herein, may be reviewed and manifest error appearing upon the face of the record of said proceedings, and upon the trial of said cause, may be by said Circuit Court of Appeals corrected, and that for said purpose a writ of error and citation thereon should issue as by law and ruling of the Court provided, and wherefore, premises considered, your petitioner prays that a writ of error issue, to the end that said proceedings of the District Court of the United States of the Western District of Washington, may be reviewed and corrected, said errors in said record being herewith assigned and presented herewith, and that pending the final determination of said writ of error by said Appellate Court, an order may be entered herein that all further proceedings be suspended and stayed, and that pending such

final determination, said defendant be admitted to bail.

EDWARD H. CHAVELLE,
Attorney for Defendant.
315 Lyon Building, Seattle, Washington.

Due service of within petition for writ of error admitted, and receipt of copy thereof acknowledged, this 13th day of November, 1923.

THOS. P. REVELLE,
United States Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 13, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [27]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7643.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

RICHARD E. KING,
Defendant.

ASSIGNMENTS OF ERROR.

Now comes the above-named defendant, Richard E. King, by Edward H. Chavelle, his counsel, and says that in the record and proceedings in the above-entitled cause, there is manifest error, in this, to wit:

1. The Court erred in overruling the motion of defendant to suppress the evidence, which motion was made before the case was called for trial and renewed before the jury was sworn and examined on their *voir dire,* and again before the jury was sworn to try the case, for the reason that all the evidence was secured by an unlawful search and seizure.

Timely exceptions were taken to the action of the Court in denying the motions to suppress the evidence. (Trans., pp. 3–6.)

2. The Court erred in allowing testimony to go to the jury during the trial of said cause, over the objection of defendant's counsel, as to statements made by the defendant, and of the surrounding circumstances as a part of the *res gestae,* for the reason that said evidence was secured through said unlawful search.

3. That the Court erred in refusing to allow to go to the jury, evidence of the previous good character of the defendant.

4. That the Court erred in allowing testimony to go to the jury during the trial of the case over the objection of defendant's counsel, which was excepted to, and exception allowed. [28]

4. That the Court erred in its refusal to instruct the jury as requested by the defendant, as follows.

I.

The Court directs you to find a verdict for the defendant, upon the ground of the insufficiency of the evidence, the search and seizure having been illegal and unlawful, in that while the defendant

was proceeding in a peaceful manner upon a highway in the city of Seattle, county of King, State of Washington, within the jurisdiction of this Honorable Court, he was halted by a federal agent, and his car searched by said federal agent, and the defendant placed under arrest by said federal agent, all without any search-warrant whatsoever, and the evidence obtained was so obtained by said unlawful search and seizure.

II.

The Court instructs you to find a verdict for the defendant, upon the ground of the insufficiency of the evidence, the search and seizure having been illegal and unlawful, in that while the defendant was proceeding in a peaceful manner upon the highway in the city of Seattle, county of King, State of Washington, within the jurisdiction of this Honorable Court, he was halted by a federal agent, and his car searched by said federal agent, and the defendant placed under arrest by said federal agent, all without any search-warrant whatsoever, and the evidence obtained was so obtained by said unlawful search and seizure.

III.

You are directed that the evidence in this case has shown that the defendant is the operator of a for hire automobile, and if the defendant has satisfied the jury that he has no knowledge of, and used due diligence to prevent the presence of the opium in said automobile, then it is your duty to acquit him. [29]

5. The Court erred in overruling the motion of

the defendant for a dismissal of said indictment, made at the close of the evidence introduced by the Government in support of the indictment, which motion was based upon the ground that all of the material evidence was secured by an unlawful search and seizure of the defendant's automobile without a search-warrant.

6. The Court erred in overruling the motion of the defendant for a direct verdict of acquittal, made at the close of the entire case, and before it was submitted to the jury, which motion was based upon the ground that there was not evidence offered except that secured by an illegal search and seizure.

7. The Court erred in denying the motion of said defendant for a new trial, which motion was made in due time after the jury had returned a verdict of guilty as charged in Counts I and II of the indictment, upon the following grounds:

1. Error in law committed by the trial Court in refusing to grant the motion of the defendant to suppress the evidence.

2. That said verdict was against and contrary to law.

3. That said verdict was against and contrary to the evidence.

4. Insufficiency of the evidence to justify the verdict.

5. Errors of law occurring during the trial, and excepted to by the said defendant.

6. Refusal of the Court to grant motion of the defendant to dismiss counts I and II of said indict-

ment on the ground of the insufficiency of the evidence to sustain either count.

7. Error of the trial Court in refusing to direct a verdict for said defendant of not guilty.

8. Refusal of the Court to instruct the jury as requested [30] by the instructions of the defendant.

8. The Court erred in denying the motion of the defendant, in arrest of judgment, which motion was made in due time after the jury had returned a verdict of guilty as charged on counts I and II of the indictment, upon the following grounds:

1. That the evidence introduced at the trial was insufficient to sustain the verdict rendered herein.

2. That the motion to suppress the evidence by reason of the illegal and unlawful search and seizure, was erroneously denied.

3. Variance between the indictment and proof introduced at the time of trial.

WHEREFORE, the said Richard E. King, defendant, prays that the judgment be reversed, and that the said Court be directed to grant a new trial of said cause.

EDWARD H. CHAVELLE,
Attorney for Defendant.

Received a copy of the within assignment of errors, this 13th day of November, 1923.

THOS. P. REVELLE,
U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. Nov. 13, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [31]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7643.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD E. KING,

Defendant.

ORDER ALLOWING WRIT OF ERROR.

On this 13th day of November, 1923, came the defendant, Richard E. King, by his attorney, Edward H. Chavelle, and files herein and presents to the Court his petition praying for the allowance of a writ of error and assignment of error intended to be urged by him, praying also, that a transcript of the records and proceedings and papers upon which judgment herein was rendered, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon the defendant giving bond according to law in the sum of $7500.00, which shall operate as a supersedeas bond.

Dated at Seattle, Washington, this 13th day of November, 1923.

JEREMIAH NETERER,
Judge.

Received a copy of the within order this 13th day of November, 1923.

THOS. P. REVELLE,
Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 13, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [32]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7643.

RICHARD E. KING,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BOND ON APPEAL.

We, Richard E. King, as principal, and Genevieve Johnson and Sidney Brunn, as sureties, all of Seattle, Washington, jointly and severally acknowledge ourselves to be indebted to the United States of America in the sum of Seven Thousand Five Hundred Dollars ($7500.00) lawful money of the United States, to be levied on our goods and chattels, lands

and tenements, for the payment of which, well and truly to be made, we bind ourselves and each of us, our heirs and executors, jointly and severally, firmly by these presents.

The condition of the above obligation is such, that whereas in the above-entitled cause a writ of error has been issued to the Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence entered therein, and an order has been entered fixing the amount of the bail bond for the release of the defendant, Richard E. King, upon bail, pending the determination of said writ of error by said appellate court, in the sum of $7500.00.

Now, therefore, if the said Richard E. King, as principal obligor, shall appear and surrender himself in the above-entitled court and from time to time thereafter as may be required, to answer any further proceedings, and shall obey and perform any judgment or order which may be had or rendered in said cause, and shall abide by and perform any judgment or order which may be rendered in the said United States Circuit Court of Appeals for the Ninth Circuit, and [33] shall not depart from said District without leave first having been obtained from the Court, then this obligation shall be null and void; otherwise in full force and effect.

IN WITNESS WHEREOF, we have set our hands and seals this 6th day of November, 1923.

RICHARD E. KING,
Principal.
GENEVIEVE JOHNSON,
SIDNEY BRUNN,
Sureties.

United States of America,
Western District of Washington,—ss.

Genevieve Johnson and Sidney Brunn, being first duly sworn, on oath each for himself and not one for the other, deposes and says: That he is a resident of the above district, and that after paying all just debts and liabilities, he is worth the sum of Fifteen Thousand Dollars in real property subject to execution within said district, over and above all exemptions, and exclusive of community interests, being his sole and separate property.

GENEVIEVE JOHNSON.
SIDNEY BRUNN.

Subscribed and sworn to before me this 6th day of November, 1923.

[Notarial Seal] EDWARD H. CHAVELLE,
Notary Public in and for the State of Washington,
Residing at Seattle.

O. K.—J. W. HOAR,
Asst. U. S. Attorney.

Approved: NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 13, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [34]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7643.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD E. KING,

Defendant.

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS: That we, Richard E. King, as principal, and Genevieve Johnson and Sidney Brunn, of Seattle, Washington, as sureties, jointly and severally acknowledge ourselves to be indebted to the United States of America, in the sum of Seven Thousand Five Hundred Dollars, lawful money of the United States, to be levied on our goods and chattels, lands and tenements, upon this condition:

Whereas, the said Richard E. King, has sued out a writ of error from the judgment of the District Court of the United States for the Western District of Washington, in the case in said court wherein the United States of America is plaintiff and Richard E. King is defendant, for a review of the said judgment in the United States Circuit Court of Appeals, for the Ninth Circuit;

Now, if the said Richard E. King shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, and

shall appear and surrender himself in the District Court of the United States for the Western District of Washington, and after the filing in said District Court of the mandate of the said Circuit Court of Appeals, and from time to time thereafter as may be required, shall answer any further proceedings, and abide by and perform any judgment or order which may be had therein or rendered in this case, and shall abide and perform any [35] judgment or order which may be rendered in the said United States Circuit Court of Appeals for the Ninth District, and not depart from the said Court or District without leave thereof, then this obligation shall be void; otherwise, to remain in full force and virtue.

Witness our hands and seals this 13th day of November, 1923.

RICHARD E. KING,
Principal.
GENEVIEVE JOHNSON,
SIDNEY BRUNN,
Sureties.

Taken and acknowledged before me this 6th day of November, 1923.

[Notarial Seal] EDWARD H. CHAVELLE,
Notary Public in and for the State of Washington,
Residing at Seattle.

United States of America,
Western District of Washington,—ss.

Genevieve Johnson and Sidney Brunn, being first duly sworn, on oath, each for himself and not one for the other, deposes and says: that he is a resi-

dent of the above district, and that after paying all just debts and liabilities, he is worth the sum of Fifteen Thousand Dollars, in real property subject to execution within said district, over and above all exemptions, and exclusive of community interests, being his sole and separate property.

GENEVIEVE JOHNSON.
SIDNEY BRUNN.

Subscribed and sworn to before me this 6th day of November, 1923.

[Notarial Seal] EDWARD H. CHAVELLE,
Notary Public in and for the State of Washington,
Residing at Seattle.

O. K.—J. W. HOAR,
Asst. U. S. District Attorney.

Approved: NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 13, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [36]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7643.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

RICHARD E. KING,
Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that prior to this cause coming on for trial on the 30th day of October, 1923, before the Honorable Jeremiah Neterer, one of the Judges of the above-entitled court, the defendant interposed a motion to suppress the evidence for the reason and upon the ground that the officers charged by law with the enforcement of the act, for the violation of which the defendant is charged, having in their possession or under their control, certain property and effects which they intend to use as evidence against the defendant at the time of trial; that the said property and effects were illegally seized and are now unlawfully held in the manner heretofore alleged, and the Government will attempt to introduce testimony supported by and based upon the said effects and property secured by its illegal search and seizure, unless the same be suppressed; that the property seized, as petitioner is informed and believes, consists of certain narcotics, a flashlight, keys, lodge cards and other personal effects of the defendant; that all the articles mentioned were illegally and unlawfully seized, without due process of law substantially under the following circumstances: On the 16th day of April, 1923, a special agent of the United States Treasury Department, one A. B. Hamer, stopped the automobile of the defendant while he was driving along the [37] highway known as Spokane Street, at the intersection of Spokane Street and Marginal Way; that the said defendant

was proceeding in a lawful and peaceful manner, and the curtains of said automobile were up, and that no one could see inside the tonneau of said car; that the said A. B. Hamer, without a search-warrant, or any warrant, ordered the defendant to stop his car, and proceeded without the consent of the petitioner, and over his protest, and illegally and unlawfully, and without warrant of law, to search said automobile; while the defendant protested against said search, the officer aforesaid proceeded to search the tonneau of said car, and there was in the tonneau of said automobile, securely wrapped in burlap, a package, the contents of which were unknown to defendant; that thereafter the said officer raised the hood of said car, and claimed to have found thereunder other packages, and that the said packages had been placed in the automobile without the knowledge of said defendant, and that thereafter, based upon said evidence claimed to have been secured by said unlawful search and seizure, said defendant was arrested and detained, and that said search and seizure were illegal and unlawful for the following reasons:

a. That said search and seizure were unlawful for the reason that the officers making the search and seizure, failed and neglected to secure a search-warrant to search the automobile of your petitioner, and at the time of said search and seizure your petitioner was proceeding in an orderly and lawful manner along the highways of the city of Seattle, without giving cause for his detention and arrest.

The plaintiff being represented by Thomas P. Revelle, DeWolfe Emory and John W. Hoar, Esquires, District Attorney, and Assistant District Attorneys, respectively, and the defendant [38] appearing by Edward H. Chavelle, Esquire.

After defendant's counsel had argued the motion to suppress:

Mr. EMORY.—The Government takes the position, the motion is not timely made.

The COURT.—I think the motion must be denied. As a matter of fact, I think it should be made before, in view of the history of this case. I think the facts set forth in Mr. Hamer's affidavit warrants the arrest without a search-warrant. The motion is denied; exception noted.

Mr. CHAVELLE.—In order to preserve the record, I object to the introduction of any evidence. May the record so show before the jury is sworn.

The COURT.—(To Jury.) Stand up and be sworn.

Jury sworn and examined on their *voir dire,* at the conclusion of which, and after the respective counsel had used what challenges they desired, the following occurred:

The COURT.—The jury will not—

Mr. CHAVELLE.—In order to keep the record clear—

The COURT.— —be sworn to try the case.

Mr. CHAVELLE.—Before they are sworn, I would like to make this motion—

(Jury sworn to try the cause.)

The COURT.—What is the motion?

Mr. CHAVELLE.—It was necessary that the motion, as I understand it, be made before the jury is sworn.

The COURT.—No.

Mr. CHAVELLE.—That is as I read the law. The motion may then be considered as made before the jury is sworn. I move to exclude all the evidence on the ground that there is no legal evidence [39] in the case; it all having been secured by an illegal search and seizure.

The COURT.—Denied. Proceed.

Mr. CHAVELLE.—Exception, your Honor.

The COURT.—Note it.

The only opposition to the defendant's motion to suppress was the affidavit of A. B. Hamer, that affiant is a special agent of the United States Treasury Department; that affiant and John W. Majewski, city detective, for the city of Seattle, have had reliable and positive information that Richard E. King was engaged in the transportation and delivery of smoking opium and other narcotics, and that said defendant handled large quantities of opium for certain Chinese in the city of Seattle, and defendant having passed west on Spokane Street in a Mitchell automobile to a point near the Fisher Flouring Mills, early on the morning of April 16, 1923, affiant and said Majewski stationed themselves on Spokane Street near East Marginal Way where defendant would naturally pass on his way back to the city, and awaited defendant's return; that defendant was halted by Hamer and said Majewski, and immediately placed under ar-

rest, and two hundred eighty-eight five-tael tins of smoking opium contained in five sacks, were found by Hamer and said Majewski in said automobile, three (3) sacks of which were found on the floor of said car, and two (2) sacks of which were found in the hood of said car.

A jury having been duly empanelled and sworn to try the cause, and counsel for the plaintiff having made his opening statement to the jury, thereupon the following proceedings were had, and testimony given, to wit: [40]

TESTIMONY OF JOHN F. MAJEWSKI, FOR THE GOVERNMENT.

JOHN F. MAJEWSKI, called on behalf of the Government, being first duly sworn, testified as follows:

That he is a police officer connected with the detective department; that on the 16th day of April, 1923, he was working nights from 7:30 until 3:30 in the morning, and after midnight we usually took the automobile and drove about the city and stopping any suspicious cars that we thought needed attention. On this particular morning we stopped Richard E. King, who said he was coming from West Seattle, that he had just taken some people over there and was returning to the city. The car was covered all around with curtains. Upon opening the rear door of the car, there were some bundles lying on the floor; the defendant said he did not know what they were; the defendant was arrested and taken with his car to headquarters, and upon

(Testimony of John F. Majewski.)

the car being searched at headquarters it was found to contain five sacks, three in the center or rear of the front seat, and two under the hood of the car, and the sacks upon being opened were found to contain two hundred eighty-nine cans of opium.

Mr. CHAVELLE.—Our objection goes to all of this for the reason and upon the ground that we contend that the evidence was secured illegally.

The COURT.—Let him answer. Proceed.

Mr. CHAVELLE.—Exception.

Answer.—(Continuing.) Some of them were a little longer than others. I would judge on the average they were about this size. They were about that square and possibly that long.

Q. Now, for the purpose of the record, how long would you say those sacks were—how many inches.

Mr. CHAVELLE.—For the purpose of the record also, I [41] object to all of this so that there can be no question about it, on the ground it is not proper or relevant, the evidence having been secured illegally, by an unlawful search.

The COURT.—Overruled.

Mr. CHAVELLE.—Exception.

Mr. Hamer, a federal officer, opened all the sacks to see whether they were all alike, and we talked to the defendant about the contents of the sacks. We searched the car thoroughly for papers or anything that might be of information to us, and we found two sacks under the hood. We just went and took charge of the car and searched it minutely. That at the time of the defendant's arrest, there was with the witness Mr. Hamer, a federal officer, and Mr.

(Testimony of John F. Majewski.)

Howaldt. That the opium was brought to the Post-office Building by Mr. Hamer, and left in Mr. Hamer's possession; that the defendant is a taxi driver, and working for his uncle.

On cross-examination, questioned by Mr. CHAVELLE, witness Majewski testified:

That he had not met the defendant before the 16th day of April, 1923, and when the defendant's car was stopped he did not know what was in the car. Defendant was proceeding in a peaceful, orderly manner along the highway. Witness further stated that he was out looking for prowlers; that the curtains of the defendant's car were up.

On redirect examination, questioned by Mr. HOAR, the witness testified:

Defendant said that two men hired the defendant, and loaded the sacks into his car; that the defendant was to meet them at Pioneer Square; that the witness knew it was not the opium of the defendant. [42]

On recross-examination, questioned by Mr. CHAVELLE, witness Majewski testified:

That he knew the opium did not belong to the defendant; that the car was a for hire car.

TESTIMONY OF C. HOWALDT, FOR THE GOVERNMENT.

C. HOWALDT, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

That he is a police officer, driver of a detective

(Testimony of C. Howaldt.)

machine; on the night of April 16, 1923, saw the defendant King.

Q. Did you have any conversation with the defendant King at that time ?

Mr. CHAVELLE.—I object to that, your Honor, for the purpose of preserving the record, for the reason and upon the ground that any conversation that was had at that time would be evidence that was secured through an illegal search and seizure, and would not be competent.

The COURT.—Overruled.

Mr. CHAVELLE.—Exception. May my objection go to all the testimony of the witness.

The COURT.—Proceed.

Mr. CHAVELLE.— —so that I will not have to reiterate it.

The witness stated that he had no personal conversation with King, but that he overheard a conversation in which the defendant said that he got the sacks over in West Seattle.

Q. Did he state from whom?

Mr. CHAVELLE.—I object to that, because of the fact that the evidence was secured by an illegal search-warrant. [43]

The COURT.—It is all under the same objection. Proceed.

The witness stated that the defendant said he took a couple of men over to West Seattle, and they hired him to haul the sacks back; that there were three sacks between the seats in the back of the car; that he was not present when the other two sacks

(Testimony of C. Howaldt.)

were found; that the sacks were opened by Mr. Hamer, a Federal agent.

On cross-examination by Mr. CHAVELLE, witness Howaldt testified as follows:

That they generaly go out after midnight prowling in that car; that they were out prowling in the detective car on the morning of the 16th of April, 1923; that the defendant was driving a for hire car; had a license for hire; that he drove his car in front of the defendant's car so it would stop; that there was no difficulty in stopping the defendant's car; that he heard the defendant ask them to go to Pioneer Square to find the men who hired him.

On redirect examination the witness testified:

That the defendant King wanted them to drive his car to Pioneer Square to meet a couple of men he was hauling this to, supposed to be waiting there on Pioneer Square; he did not hear anything said by Mr. Majewski or Mr. Hamer about not going at that time, or any reason given by either for not going.

TESTIMONY OF A. B. HAMER, FOR THE GOVERNMENT.

A. B. HAMER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Mr. CHAVELLE.—Note my objection on the same ground, to the testimony of this witness.

That he is a special agent of the treasury department; that on the morning of the 16th of April, 1923, at about 3:50 A. M., he was sitting in the rear

(Testimony of A. B. Hamer.)

seat of a police car of the said city of Seattle driven by police officer Howaldt, who was driving the car along East Marginal Way in the city. Majewski stopped the defendant and opened defendant's car and found in the car the narcotics in question; that he, Hamer, was in the police car and subsequently assisted in the search; [44] that he saw the defendant on the night of April 16, 1923, at about the hour of four o'clock.

Told the defendant we had found this opium in the car, and asked him who he was hauling it for. He said a couple of Chinese had employed him. He didn't know their names, and that was about the extent of the conversation with him; that the opium had been in witness' possession ever since the arrest; that there were two hundred and seventy-seven tins, besides the one marked for identification; that the opium was prepared for smoking; that a specimen had been presented to the laboratory for test.

Q. (By the COURT.) Relate the circumstances of the arrest, and what you know about it; how you happened to be there.

A. One of the officers in Tacoma called me up a couple of days previously—

Mr. CHAVELLE.—I object to what the officer in Tacoma did in regard to calling him up.

The COURT.—Overruled.

Mr. CHAVELLE.—Without the presence of the defendant. Exception.

(Testimony of A. B. Hamer.)

A. —told me that King was over there with an automobile.

Q. (By the COURT.) Not what King was doing, over there in Tacoma.

A. I thought you wanted to know how we knew he was down there.

Q. Not what anybody told you about King, in the absence of King.

A. I don't know how to explain it. I knew the boys over there were watching him.

Mr. CHAVELLE.—I object to that, and ask to have it [45] stricken and the jury instructed to disregard it.

Q. Proceed. What you know yourself about the defendant.

A. A Blue Funnel boat came over here that morning, and we watched for him that night.

Mr. CHAVELLE.—I object to that as irrelevant and immaterial.

The COURT.—The objection is overruled.

Q. Were you present when any opium was found in the car?

A. Yes, we found two bags under the hood.

Q. (By the COURT.) In view of my ruling, I will ask you this: What else, if anything, did you know with relation to the defendant that led you to arrest him?

Mr. CHEVALLE.—I object to that, your Honor, as incompetent, irrelevant and immaterial.

The COURT.—Let that be noted.

Mr. CHAVELLE.—Exception.

(Testimony of A. B. Hamer.)

A. I had known he was in this business for a long time.

Mr. CHAVELLE.—I object to that. That is a conclusion of the witness.

The COURT.—That may be stricken.

Mr. CHAVELLE.—I ask that the jury be instructed to disregard it.

Q. Mr. Hamer, did you have any reason to believe that the defendant in this case was going to receive a shipment of opium from any source, on the night in question?

Mr. CHAVELLE.—I object to that.

The COURT.—He may state whether the defendant was under suspicion, whether he had reason to believe a felony was being committed. [46]

Mr. CHAVELLE.—Exception.

A. I did.

On cross-examination by Mr. CHAVELLE, witness Hamer testified as follows:

He went along Marginal Way about three o'clock in the morning, of the morning of the 16th of April, 1923, in the police car, and stopped the cars of several people, and then the car of the defendant. That just prior to stopping the car of the defendant, he was proceeding along the highway in an orderly manner, the curtains were up on his car; that he did not have any search-warrant; that he assisted in the search of the car; that the narcotics were found in the car.

Q. You participated in this arrest?

A. Yes, sir. I did.

(Testimony of A. B. Hamer.)

Q. You participated in the search?

A. Yes, sir.

That the packages were securely wrapped, and had to be cut open in order to get into them. That there was no way for an observer on the highway seeing the packages in the car.

TESTIMONY OF DORIS McINTYRE, FOR THE GOVERNMENT.

DORIS McINTYRE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

That she is a chemist; that she made an examination of the contents of the can marked Government's Exhibit Two, for identification, and found it to be smoking opium.

TESTIMONY OF A. B. HAMER, FOR THE GOVERNMENT (RECALLED).

A. B. HAMER, recalled on behalf of the Government, testified as follows: [47]

That the appraised value of the opium was twenty-one thousand six hundred dollars.

On cross-examination, questioned by Mr. CHAVELLE, witness Hamer testified as follows:

Q. Mr. Hamer, an affidavit was filed in this case that the defendant was halted by you. Did you not swear to that?

A. He was halted by us—Majewski.

Q. Your affidavit under date of the 14th day of June, to refresh your recollection, says: "The de-

(Testimony of A. B. Hamer.)

fendant was halted by affiant''—that is yourself—"and said Majewski, and immediately placed under arrest,'' that is right?

A. And said Majewski.

Q. And said Majewski.

A. And said Majewski, yes.

Q. That is all.

Mr. HOAR.—At this time we offer the Government's Exhibit No. 2 in evidence. I think we neglected to before.

Mr. CHAVELLE.—I object upon the ground and for the reason that the same was secured by an unlawful search and seizure.

The COURT.—Admitted.

Mr. CHAVELLE.—Exception.

(Can of opium received in evidence, and marked Government's Exhibit No. 2.)

Thereupon the Government rested. This was all the testimony and evidence offered by the Government on behalf of the prosecution.

Mr. CHAVELLE.—We move to dismiss Counts I and II of the indictment, for the reason and upon the ground that all the material evidence here was secured by an [48] unlawful search and seizure of the defendant's automobile, without a search-warrant.

The COURT.—Denied.

Mr. CHAVELLE.—Exception.

DEFENDANT'S CASE.

TESTIMONY OF GENEVIEVE JOHNSON, FOR DEFENDANT.

GENEVIEVE JOHNSON, called as a witness on behalf of the defendant, testified as follows:

That she is the mother of the defendant; operates in conjunction with her husband a for-hire automobile stand for the past ten years; that the defendant has worked for her since he came from the army, for the past five years; that part of the time he worked nights; that he worked on the evening of April 15th, and the morning of the 16th day of April, 1923; that the defendant lived with the witness.

On cross-examination, the witness Genevieve Johnson testified:

That the defendant occasionally stayed down town; that the Mitchell car was the only car he drove at that time.

TESTIMONY OF RICHARD E. KING, FOR DEFENDANT.

RICHARD E. KING, the defendant herein, called as a witness on his own behalf, testified as follows:

That on the night of April 15, or the morning of the 16th, 1923, he received a telephone call to come to the Seattle Hotel; working for his stepfather on the night shift; had worked for him ever since he left the army, mostly nights. The message over the telephone was "Send a cab down to the Seattle

(Testimony of Richard E. King.)

Hotel"; that he answered the call and picked up two passengers, a Chinaman [49] and a white man; told him to drive them over to West Seattle; went out on Railroad Avenue and Marginal Way, turned west on Spokane Avenue and his passengers left him around the Marine Iron Works; told him to wait for them; got there about 1:30 A. M., and waited quite a little while, probably two hours. He was tired and it was late and cold, and he fell asleep; that his passengers shook him and woke him up; told him to go back to town and take these packages which they threw into the car; curtains of car were up, it was bad weather, and the curtains had been up all the time; car belonged to stepfather; he had driven it on rent for some time; passengers told the defendant to drive to Pioneer Square and wait there; proceeded towards Pioneer Square which was near Seattle Hotel, the place they had started from.

Was stopped and car was opened and searched; the defendant further testified that they made him get out of his car, and they proceeded to open the door, and said, "What have you got?" and the defendant said he did not know, that the packages were securely wrapped; that he did not know it was opium; that he hadn't the least suspicion it was opium; that he asked the officers to take him to Pioneer Square, that if they would take him down there they would probably find the owners; they would not take him, would not believe his word, but instead took him to the police station,

(Testimony of Richard E. King.)

which is on the same street as Pioneer Square; that the arresting officers told him they were just prowling around there and stopped several cars that night.

Q. Were you decorated with the Croix de Guerre and Distinguished Service Cross?

Mr. EMORY.—That is objected to as incompetent, irrelevant and immaterial. We are not trying this man on his war record. I object to that. [50]

The COURT.—Objection sustained.

Mr. CHAVELLE.—Exception.

On cross-examination, questioned by Mr. HOAR, the defendant, Richard E. King, testified:

That there was a Chinaman and a white man standing right by the Seattle Hotel when I slowed up and said, "Are you from Main 6320?" and I said, "Yes" and they got in. They had not paid for making the trip.

That he went down Railroad Avenue to West Spokane, and west on Spokane Street to Alki Avenue; that his passengers got out of the machine; that he stopped the car right on the highway; that he could not say where they went, it was dark, that he waited two hours. That he did not see them come back, because he was asleep; that the curtains of his car were up; that he does not know who put the sacks in the car; that they woke him up and said take these packages down—that they had the door open and put them in and that is when they shook me; that he did not know that any sacks were placed under the hood; they told him to meet them

(Testimony of Richard E. King.)

at Pioneer Square; that nothing had made him suspicious of the transaction; that he is not in the habit of getting paid beforehand; had been driving car he was in that night for about six months; that he did not know the license number of the car; that car belonged to his stepfather; that he had used a Chandler car to go out home with, and had not used it all the time, except this night when he took the Mitchell car; that he did not take the car without the permission of his stepfather; that the search-light that was in the car was always in the car, and used by driver to look for house numbers. That he had not purchased light himself; that it belonged to Mr. Johnson; that he hadn't had the [51] light, that it was in the car when he happened to drive it, and that it was always left in the car; did not know what was in the sacks; they did not look suspicious to him; had stopped at the Hydak Hotel.

On redirect examination, questioned by Mr. CHAVELLE, the defendant, Richard E. King, testified:

Was employed to drive car, and did not need permission to take it; that a spot-light was generally in the car unless there was one on the car; no spot-light on this car.

TESTIMONY OF JAMES JOHNSON, FOR DEFENDANT.

JAMES JOHNSON, called as a witness on behalf of the defendant, testified as follows:

That he operates a taxi for-hire stand, for the

(Testimony of James Johnson.)

past ten years; stepfather of Richard King, who works for him; that the Mitchell car he had that night is one of the cars kept upon the stand; has a for-hire license; the spot-light belonged to the witness; that he left the stand about midnight on the 15th of April, 1923; the defendant was working the night shift; most of his business comes over the telephone.

On cross-examination, questioned by Mr. HOAR, the witness James Johnson testified as follows:

That the car in question belongs to the witness; did not remember license number of car; did not state to officer that the car was taken without his permission; bought spot-light at Melin Bros. Drug Store, at a sale, at 511 Fourth Avenue, and paid $3.50 for it; used it because he had no spot-light on the car.

TESTIMONY OF JIM RUSSELL, FOR DEFENDANT.

JIM RUSSELL, called as a witness on behalf of the defendant, testified as follows: [52]

That he is a for-rent car driver, working for Mr. and Mrs. Johnson; was present on the morning of the 16th day of April, 1923, when Mr. King, the defendant, answered a call, and witness asked him where he was going, and he said, "Seattle Hotel." He judged it was about one o'clock.

Defendant rests.

TESTIMONY OF JOHN F. MAJEWSKI, FOR THE GOVERNMENT (RECALLED IN REBUTTAL).

JOHN F. MAJEWSKI, recalled in rebuttal, on behalf of the Government, testified as follows:

That to the best of his recollection, Mr. Johnson told him that his son had taken the car without his permission; that the car in question came from the direction of Fisher's Flouring Mill.

On cross-examination, questioned by Mr. CHAVELLE, the witness Majewski testified:

That he was not looking for any particular car.

TESTIMONY OF C. HOWALDT, FOR THE GOVERNMENT (RECALLED IN REBUTTAL).

C. HOWALDT, recalled in rebuttal, testified as follows:

That the car came from Fisher's Flouring Mill.

On cross-examination, questioned by Mr. CHAVELLE, the witness Howaldt testified:

That the two roads in question do not parallel each other except for a block; that he does not know where the Marine Iron Works is.

This was all the testimony and evidence offered on behalf of the Government.

Thereupon the Government rested.

Motion for a directed verdict was made.

Mr. CHAVELLE.—At this time the defendant desires to move for a directed verdict, upon the ground and for the reason, [53] there is no evi-

dence secured here except by illegal search and seizure; that all the evidence in this case has been so secured.

The COURT.—Motion denied.

Mr. CHAVELLE.—Exception.

The COURT.—There is testimony here that the search was made by the police officers of the city, and there is likewise testimony that there was reason to believe that a felony was being committed. The motion is denied. Exception noted.

Argument was made on behalf of the Government and on behalf of the defense, and the Court gave the instructions to the jury as follows:

INSTRUCTIONS OF COURT TO THE JURY.

Gentlemen of the Jury:

The indictment is in two counts. Count I charges the defendant with fraudulently, contrary to law, importing and bringing into the United States two hundred and eighty-eight five-tael tins of opium, prepared for smoking. And Count II charged him with buying and receiving, against the provisions of law, two hundred and eighty-eight five-tael tins of this smoking opium. He has pleaded not guilty to each count in the indictment; that means he denies them. He is presumed innocent until he is proven guilty by the testimony which has been presented beyond every reasonable doubt. This burden is upon the Government to show he is guilty by that degree of proof.

In this case the issue is not complicated, but is rather simple. Many of the facts are admitted, or are not disputed. For instance, it is not disputed

that two hundred and seventy-eight, I think the testimony shows, of the five-tael tins of opium, were in the automobile driven by the defendant upon the night in question. It is admitted that the defendant [54] transported this opium, that is, he had it in his automobile, and was driving along the street; it was in his possession; that is not disputed, or admitted.

You are instructed it is a rule of evidence, and by the Act of Congress under which this prosecution is carried on, that if the Government has shown that the party charged is in the possession of opium, then it is presumed that he came by it in the way charged in the indictment in this case. When it is shown that the defendant was in the possession of the opium, then the presumption is that he imported it, or bought it, or received it, contrary to the provisions of the law, and the burden is upon him to explain that he came by it lawfully.

Now, in this case the defendant claims he did not know it was in his possession; and he did not know what it was. Now, if the defendant did not know that this was opium, then he is not guilty under the law, because no person can be convicted of an act of which he is unconscious, and be penalized under the law. So that the only issue for you to determine in this case is did the defendant know that this was opium. If he did he is guilty; if he did not, then he is not guilty. Now, to determine then, whether he knew, you must take into consideration all the circumstances that have been developed by the testimony in this case, his relation to the nar-

cotic which was in the automobile in his possession, and from all the circumstances determine what the fact is.

You, Gentlemen, are the sole judges of the facts; you must determine what the facts are from the evidence and the circumstances which have been presented. You are likewise the sole judges of the credibility of the witnesses who have testified before you; and in determining the weight or the credit [55] of any witness who has testified, you will take into consideration the demeanor of such witness upon the stand; the reasonableness of the story; the opportunity of the witness for knowing the things about which he has testified; and the interest or lack of interest in the result of this trial; and from all this determine where the truth is.

And you are instructed, that circumstantial evidence is legal and competent in a criminal case; and when the circumstances which have been detailed so dovetail into each other, and be consistent with each other, consistent with the defendant's guilt, and inconsistent with his innocence, and inconsistent with every other reasonable hypothesis except that of his guilt, then the circumstances alone would be sufficient to convict.

There is not much dispute in the evidence of the witness on the part of the Government, except the testimony of the witnesses on the part of the Government that the defendant made certain statements to them, "Yes, he presumed it was opium," or "he believed it was opium," or "had a strong con-

ception that it was opium,"—whatever the testimony is. The defendant denies that.

Some emphasis was placed by the argument of counsel for the defense with relation to the search that was made of the automobile that night, and the conduct and acts of the officers. You are instructed that the Court has heretofore upon the record in this case, all of which is not before you—has decided that the search was not unlawful, under all the circumstances which have been detailed to the Court, and of which the jury knows nothing about. The jury, therefore, has nothing to do with the search; it simply passes upon the testimony and [56] the weight and the credibility of the witnesses, and determine the facts from the testimony which was admitted before you upon the trial.

The defendant, of course, is interested, because if he is found guilty he must be punished. Would the defendant, because of his interest in this case, and would the stepfather of the defendant, because of the relation he bears to the defendant, or would the mother of the defendant, because of her interest in the defendant as his mother, would they color a statement before you which either lacks all of the truth, or which does not state the facts. Would the defendant, because of his interest, tell a story which would exonerate him from any liability, with a view of escaping the penalty of the law; these are all elements to be taken into consideration by you.

Now then, did the defendant's story ring true? You will take into consideration, for instance, the time of night when he was called out; twelve o'clock

at night, or one o'clock at night; the mission he was engaged to perform, as testified to by him. The white man and the Chinaman who entered the cab, as he has stated. Then likewise take into consideration the other circumstances, the flash-light which has been introduced in testimony, and which is shown by all the witnesses that it was in the automobile. The stepfather stating himself that he bought it. This flash-light, when you notice it, has three lights, a red, a green and a white; did that flash-light bear any relation to this trip this night? Is the red light for a danger signal, the green light for safety, and the white light the ordinary light; what is the purpose of such a light as that in an automobile? The stepfather says he bought [57] it because it was cheap; and you will take all this testimony into consideration, and connect all these matters up.

And then take the defendant's testimony, that he drove down to some place, as his testimony disclosed; the men got out, and bid him to wait; they were gone for several hours, came back, and put these sacks into the automobile. He testified he did not know the men then, and don't know who they are now, and hadn't paid him yet. Does it sound reasonable for a man of his discretion and experience in life to do that, without making any inquiry, and finding three packages in the automobile, and two under the hood of the car. He testified he was asleep and did not know these bags were there. Does that sound reasonable? Would any stranger place upon an engine in an automobile under the hood, without the driver's knowledge, anything, especially of the type as has

been testified to here—the size of the bags? Did the defendant himself put these things in the automobile; did he himself put these bags under the hood? These are all circumstances to be taken into consideration. Did his testimony ring true? If it did, then he ought not to be convicted. If it did not, then he should be convicted. The Government does not want him convicted unless he is guilty, and unless the testimony shows he is guilty beyond a reasonable doubt; but the Government does not want him acquitted if the testimony shows that he is guilty. We can only maintain Government by having law enforcement, and if courts and juries fail to function and discharge the duties which the law fixes, it would only be a short time when a condition of anarchy would arise in this country. We know that this narcotic traffic is the worst that we have to meet in our civilization; but simply because that is so, and the [58] traffic is bad, why no innocent man should be convicted; but when the testimony shows that persons are guilty, then there ought to be no hesitancy.

Some reference has been made to the mother. We all sympathize with the mother; we know it is always the innocent that suffer. If the Court would fail to function simply because the innocent suffer, we might as well close the books and the courts.

You will therefore approach this issue fairly, as twelve fair-minded men, giving the defendant a square deal, and giving the Government a square deal, and conclude, as in your conscience, the law and the facts warrant and justify.

You are instructed that a reasonable doubt is just such a doubt as the term implies, a doubt for which you can give a reason; it is not a speculative, imaginary or a conjectural doubt; it is a doubt which is created by the want of evidence, or by the evidence itself. A juror is satisfied beyond a reasonable doubt when he is convinced to a moral certainty of the guilt of the defendant.

It will require your entire number of twelve to agree upon a verdict, and when you have agreed you will cause it to be signed by your foreman, whom you will elect immediately upon retiring to your jury-room. The verdict is in the usual form—a blank before guilty; you will write "Is" or "Not" as you may find; you may find the defendant guilty on one or both counts, or not guilty on one or both counts, as you may find.

Thereupon the Court, not having given the instructions asked by the defendant, the Court was requested to give instructions Nos. 1, 2 and 3, as follows: [59]

REQUESTED INSTRUCTIONS OF COURT TO THE JURY.

I.

The Court directs you to find a verdict for the defendant, upon the ground of the insufficiency of the evidence, the search and seizure having been illegal and unlawful, in that while the defendant was proceeding in a peaceful manner upon a highway in the city of Seattle, county of King, State of Washington, within the jurisdiction of this Honorable Court,

he was halted by a federal agent, and his car searched by said federal agent, and the defendant placed under arrest by said federal agent, all without any search-warrant whatsoever, and the evidence obtained was so obtained by such unlawful search and seizure.

II.

The Court instructs you to find a verdict for the defendant, upon the ground of the insufficiency of the evidence, the search and seizure having been illegal and unlawful, in that while the defendant was proceeding in a peaceful manner upon a highway in the city of Seattle, county of King, State of Washington, within the jurisdiction of this Honorable Court, he was halted by a federal agent, and his car searched by said federal agent, and the defendant placed under arrest by said federal agent, all without any search-warrant whatsoever, and the evidence obtained was so obtained by said unlawful search and seizure.

III.

You are directed that the evidence in this case has shown that the defendant is the operator of a for-hire automobile, and if the defendant has satisfied the jury that he had no knowledge of and used due diligence to prevent the presence of the opium in said automobile, then it is your duty to acquit him. [60]

The COURT.—Take your exceptions to the instructions by number.

Mr. CHAVELLE.—All right. Requested Instructions Nos. I, II and III. We take an exception.

The COURT.—Exception noted.

The jury then retired, and after deliberation returned a verdict of guilty as charged, under both counts of the indictment.

Thereafter the defendant gave notice of his intention to ask for a new trial, and for arrest of judgment.

Thereupon, within the time allowed, before sentence was imposed, the defendant moved for a new trial, upon the following grounds:

1. Error in law committed by the trial Court in refusing to grant the motion of the defendant to suppress the evidence.

2. That said verdict was against and contrary to law.

3. That said verdict was against and contrary to the evidence.

4. Insufficiency of the evidence to justify the verdict.

5. Errors of law occurring during the trial, and excepted to by the said defendant.

6. Refusal of the Court to grant motion of the defendant to dismiss Counts I and II of said indictment, on the ground of the insufficiency of the evidence to sustain either count.

7. Error of the trial Court in refusing to direct a verdict for said defendant of not guilty.

8. Refusal of the Court to instruct the jury as requested by the instructions of the defendant.

Said defendant also moved for arrest of judgment upon [61] the following grounds:

1. That the evidence introduced at the trial was insufficient to sustain the verdict rendered herein.

2. That the motion to suppress the evidence by reason of the illegal and unlawful search and seizure was erroneously denied.

3. Variance between the indictment and proof introduced at the time of trial.

Thereupon the Court denied each of said motions. The Government moved for judgment and sentence, and the Court then entered judgment and sentence as follows: That the defendant be confined in the penitentiary at McNeil Island for a term of not more than six years, and pay a fine of fifty dollars.

And now, in furtherance of justice, and that right may be done the defendant Richard E. King, said defendant prays that this bill of exceptions may be settled, allowed, signed and sealed by the Court, and made a part of the record.

EDWARD H. CHAVELLE,
Attorney for Defendant Richard E. King. [62]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7643.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

RICHARD E. KING,
Defendant.

ORDER SETTLING BILL OF EXCEPTIONS.

Now, on this 12th day of Dec. 1923, the above cause came on for hearing on the application of the defendant, Richard E. King, to settle the bill of exceptions in this case. Counsel for both parties appeared, and it further appearing to the Court that said bill as heretofore lodged with the clerk is duly and seasonably presented for settlement and allowance, and it further appearing that said bill of exceptions contains all of the material facts occurring upon the trial of the cause, together with the exceptions thereto, and all the material matters and things occurring upon the trial, except the exhibits introduced in evidence which are hereby made a part of said bill of exceptions by reference and incorporation; and the Court being duly advised, it is by the Court

ORDERED, that said bill of exceptions be and it is hereby settled as a true bill of exceptions in said cause, which contains all of the material facts, matters, things, and exceptions thereto occurring upon the trial of said cause and not of record heretofore, and the same is hereby certified accordingly by the undersigned Judge of this Court, who presided at the trial of said cause, as a true, full and correct bill of exceptions, and the Clerk of the Court is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court [63] of Appeals for the Ninth Circuit.

JEREMIAH NETERER,
United States District Judge.

Received bill of exceptions this 13th day of November, 1923.

THOS. P. REVELLE,
U. S. Attorney.

[Endorsed]: Lodged in the United States District Court, Western District of Washington, Northern Division. Nov. 13, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 12, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [64]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7643.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

RICHARD E. KING,
Defendant.

ORDER EXTENDING TIME TO AND INCLUDING JANUARY 3, 1924, TO FILE RECORD AND DOCKET CAUSE.

For good cause now shown, it is ORDERED, that the time for filing the record in the above-entitled cause in the office of the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit,

be and the same is hereby extended to the 3d day of January, 1924.

Done in open court this 8th day of December, 1923.

JEREMIAH NETERER,
Judge.

O. K.—J. W. HOAR,
Spec. Asst. U. S. Atty.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 8, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [65]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7642.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

RICHARD E. KING,
Defendant.

ORDER EXTENDING TIME TO AND INCLUDING JANUARY 31, 1924, TO FILE RECORD AND DOCKET CAUSE.

For good cause now shown, it is ORDERED, that the time for serving and filing the record in the above-entitled cause in the office of the Clerk of the Circuit Court of Appeals, be and the same is hereby extended to the 31st day of January, 1924.

Done in open court this 29th day of December, 1923.

JEREMIAH NETERER,
U. S. District Judge.

O. K.—MATTHEW W. HILL,
U. S. District Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 31, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [66]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7643.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

RICHARD E. KING,
Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare copies of the following documents and papers in the above cause and forward them under your certificate and seal to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, as a transcript of record in said cause, viz.:

1. Indictment.

2. Petition to suppress evidence.
3. Amended petition to suppress evidence.
4. Affidavit of A. B. Hamer.
5. Arraignment and plea.
6. Assignments of error.
7. Bill of exceptions.
8. Bond on appeal.
9. Bond for writ of error.
10. Certificate of Clerk of U. S. District Court to transcript of record.
11. Citation on writ of error.
12. Court's instructions to jury.
13. Hearing on motion for new trial and in arrest of judgment and order denying same.
14. Motion for new trial.
15. Motion in arrest of judgment.
16. Order allowing writ of error.
17. Petition for writ of error.
18. Praecipe for transcript of record.
19. Sentence.

EDWARD H. CHAVELLE,
Attorney for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 15, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [67]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7643.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD E. KING

Defendant.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 67, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees

and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [68]

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate or return, 171 folios at 15c $25.65

Certificate of Clerk to transcript of record, 4 folios at 15c ..... .60

Seal to said certificate ..... .20

I hereby certify that the above cost for preparing and certifying record, amounting to $26.45, has been paid to me by attorney for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and the original citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 26th day of January, 1924.

[Seal] F. M. HARSHBERGER,
Clerk U. S. District Court, Western District of Washington. [69]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7643.

RICHARD E. KING,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

WRIT OF ERROR.

United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States of America:

To the Honorable Judge of the District Court of the United States for the Western District of Washington, Northern Division:

Because in the record and proceedings, as also in the rendition of judgment, of a plea which is in the said District Court before you, between the United States of America, as plaintiff, and Richard E. King, as defendant, a manifest error hath happened, to the great damage of the said defendant, Richard E. King, as by his complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court

of Appeals for the Ninth Circuit, together with this writ, within thirty days from the date hereto, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done. [70]

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 13th day of November, 1923.

[Seal] F. M. HARSHBERGER,
Clerk of the United States District Court for the Western District of Washington, Northern Division.

Service of within writ of error admitted, and receipt of copy thereof acknowledged, November 13th, 1923.

THOS. P. REVELLE,
MPO,
Attorney for Defendant in Error.

Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 13, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [71]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7643.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD E. KING,

Defendant.

CITATION ON WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to the United States of America, and to THOMAS P. REVELLE, United States Attorney for the Western District of Washington, Northern Division, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, within thirty days from date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States, for the Western District of Washington, Northern Division, wherein the said Richard E. King is plaintiff in error, and the United States of America is defendant in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the party in that behalf.

WITNESS, the Honorable JEREMIAH NETERER, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 13th day of November, 1923.

[Seal] JEREMIAH NETERER,
United States District Judge.

Received copy, November 13, 1923.

THOS. P. REVELLE,
O,
Attorney for Plaintiff.

Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 13, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [72]

[Endorsed]: No. 4210. United States Circuit Court of Appeals for the Ninth Circuit. Richard E. King, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Received Jan. 30, 1924.

F. D. MONCKTON,
Clerk.

Filed March 6, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4210

In The United States
Circuit Court of Appeals
For the Ninth Circuit

RICHARD E. KING,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF RICHARD E. KING,
Plaintiff in Error.

EDWARD H. CHAVELLE,
Attorney for Plaintiff-in-Error, Richard E. King.

315-321 Lyon Building,
Seattle, Washington.

Gateway Printing Co.

In The United States
Circuit Court of Appeals
For the Ninth Circuit

RICHARD E. KING,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF RICHARD E. KING, Plaintiff in Error.

STATEMENT OF THE CASE.

An information was filed in this case charging the plaintiff in error, Richard E. King, with a violation of the Narcotic Drugs Import and Export Act, on two counts; with the importation of opium, on Count I, and with the buying, receiving and concealing of the same opium, on Count II.

Thereafter and prior to the arraignment a petition to suppress the evidence, upon the ground of an illegal and unlawful search and seizure, was filed, which was denied and exception allowed (Tr. p. 10). Thereafter and prior to the arraignment an amended petition to suppress the evidence was filed, duly verified by the plaintiff in error and supported by his affidavit, which was denied and exception allowed (Tr. pp. 10-17). Thereupon, plaintiff in error was arraigned and thereafter entered a plea of not guilty and was placed on trial (Tr. 17-18).

At the conclusion of the trial the jury returned a verdict of guilty on both counts of the indictment against the plaintiff in error, and, after motions in arrest of judgment and for a new trial were duly made and denied, plaintiff in error was sentenced to serve a term of six years in the Federal Penitentiary on each count of the indictment, terms to run concurrently, and to pay a fine of fifty dollars on each of Counts I and II (Tr. pp. 25-26).

The evidence of the Government tended to establish that on the 16th day of April, 1923, A. B. Hamer, a Government agent, in conjunction with John F. Majewski, a police officer, and C. Howaldt, also a police officer, stopped Richard E. King, the plaintiff in error, who was driving a "for hire" automobile in a peaceful and orderly manner on a public highway; that the officers were not armed with a search warrant or any warrant at all, but

immediately placed the plaintiff in error under arrest and proceeded to search his automobile and found some bundles lying on the floor of the car, which were securely wrapped, and also some sacks or bundles of the same character under the hood of the car; that the sacks were opened by the Federal Officer, A. B. Hamer, who was present at all times during the search and seizure, participating in the arrest and in the search and seizure, and that the sacks were found to contain smoking opium and were taken to the Post Office Building by the said Hamer, remaining in his possession during all the time until the trial; that they knew it was not the property of the plaintiff in error (Tr. pp. 44-53).

Officer Majewski testified:

That he had not met the plaintiff in error before the 16th day of April, 1923 (the day in question), and when the plaintiff in error's car was stopped he did not know what was in the car. Plaintiff in error was proceeding in a peaceful, orderly manner along the highway; that he, the officer, was out looking for prowlers (Tr. p. 46).

That at the time of the plaintiff in error's arrest there was with the witness Mr. Hamer, a federal officer (Tr. p. 45).

A. B. Hamer, Federal Agent, called as a witness on behalf of the Government, testified as follows:

"Q. You participated in this arrest?

"A. Yes, sir, I did.

"Q. You participated in the search?

"A. Yes, sir.

"Q. Mr. Hamer, an affidavit was filed in this case that the defendant was halted by you. Did you not swear to that?

"A. He was halted by us—Majewski.

"Q. Your affidavit under date of the 14th of June, to refresh your recollection, says: 'The defendant was halted by affiant'—that is yourself—'and said Majewski, and immediately placed under arrest,' that is right?

"A. And said Majewski.

"Q. And said Majewski?

"A. And said Majewski, yes."

(Tr. pp. 48-53).

The plaintiff in error admitted no identification whatsoever with the transaction, except that he operated a "for-hire" automobile, was employed by his stepfather as a driver, and while acting in such capacity received a telephone call to come to the Seattle Hotel, where he went, picked up two passengers, drove them to West Seattle; that while he was proceeding to Pioneer Square, where he started from, in a peaceful and orderly manner, he was stopped by the officers, and, while the car was curtained, it behind bad weather, it was opened and searched; the packages in the car were securely wrapped and he did not know that they contained

opium; that the arresting officers told him that they were just prowling around there and had stopped several cars that night (Tr. pp. 54-58).

The questions presented in the record are:

1. Did the Court err in denying the amended petition to suppress the evidence and in denying the motion of counsel for the plaintiff in error to dismiss Counts I and II of the indictment, made at the end of the Government's case, for the reason and upon the ground that all material evidence was secured by an unlawful search and illegal seizure of the plaintiff in error's automobile without a search warrant, and in denying the motion of plaintiff in error for a directed verdict, for the same reason and upon the same ground, and in overruling plaintiff in error's objections to the introduction of the evidence secured by the illegal and unlawful search and seizure.

2. Did the Court err in refusing to instruct the jury as requested in writing by the plaintiff in error.

3. Did the Court err in overruling counsel for the plaintiff in error's motion for an arrest of judgment and for a new trial.

ASSIGNMENTS OF ERROR.

Assignment No. 1. The Court erred in overruling the motion of the plaintiff in error to suppress the evidence, which motion was made before the case was called for trial and renewed before the jury was sworn and examined on their *voir dire,* and

again before the jury was sworn to try the case, for the reason that all the evidence was secured by an unlawful search and seizure.

The amended petition to suppress states that on the day in question A. B. Hamer, Special Federal Agent, stopped the automobile of the petitioner while he was proceeding in a lawful and peaceful manner, without a search-warrant or any warrant whatsoever, and proceeded to illegally and unlawfully search his car, without any warrant in law. Based upon the evidence so secured, this prosecution was commenced (Tr. pp. 10-14). Said petition was supported by the affidavit of Richard E. King, which, in substance, states that he was proceeding in a lawful and peaceful manner along the highway in his automobile when a special agent of the United States Treasury Department, located at Seattle, namely, A. B. Hamer, stopped the automobile of the plaintiff in error without any warrant and without the consent of the plaintiff in error and illegally and unlawfully and without any search warrant or any warrant in law, proceeded to search his automobile, while the plaintiff in error protested against such search; said officer found a package in the tonneau of said car, the contents of which were unknown to plaintiff in error, which was securely wrapped in burlap, and that said officer, A. B. Hamer, Federal agent, broke open said package and examined the contents; that there was another officer, John W. Majewski, with the said A. B.

Hamer at said time and place; that thereafter they raised the hood of the automobile and found certain packages under the hood of the same, and that subsequently a charge was filed based upon said evidence solely, unlawfully and illegally secured (Tr. pp. 14-15).

The affidavit of A. B. Hamer states that he was a Special Agent of the United States Treasury Department; that he halted the plaitniff in error and immediately placed him under arrest and searched the automobile driven by the said plaintiff; in error that he had no search warrant and found certain sacks on the floor and under the hood of said car, upon which this prosecution is based (Tr. pp. 18-19).

Said motion to suppress was denied and exception allowed (Tr. p. 17).

Assignment No. 2. The Court erred in allowing testimony to go to the jury during the trial of said case over the objection of counsel for plaintiff in error, which evidence was incompetent and to the prejudice of the plaintiff in error and an attempt to support the unlawful search and seizure.

> "MR. CHAVELLE: In order to preserve the record, I object to the introduction of any evidence. May the record so show before the jury is sworn.
>
> "THE COURT (To Jury): Stand up and be sworn.
>
> "Jury sworn and examined on their *voir dire,* at the conclusion of which, and after the

respective counsel had used what challenges they desired, the following occurred:

"THE COURT: The jury will now—

"MR. CHAVELLE—In order to keep the record clear—

"THE COURT—Be sworn to try the case.

"MR. CHAVELLE: Before they are sworn, I would like to make this motion—

"(Jury sworn to try the cause).

"THE COURT: What is the motion?

"MR. CHAVELLE: It was necessary that the motion, as I understand it, be made before the jury is sworn.

"THE COURT: No.

"MR. CHAVELLE: That is as I read the law. The motion may then be considered as made before the jury is sworn. I move to exclude all the evidence on the ground that there is no legal evidence in the case; it all having been secured by an illegal search and seizure.

"THE COURT: Denied. Proceed.

"MR. CHAVELLE: Exception, your Honor.

"THE COURT: Note it." (Tr. pp. 42-43).

John F. Majewski, called as a witness on behalf of the Government, testified that he was a police officer riding around the city; that he stopped the plaintiff in error, Richard E. King, who was coming from West Seattle. When they opened the rear door of the car they found some bundles lying on the floor.

"MR. CHAVELLE: Our objection goes to all of this for the reason and upon the ground that we contend that the evidence was secured illegally.

"THE COURT: Let him answer. Proceed.

"MR. CHAVELLE: Exception.

"Answer (Continuing): Some of them were a little longer than others. I would judge on the average they were about this size. They were about that square and possibly that long.

"Q. Now, for the purpose of the record, how long would you say those sacks were—how many inches?

"MR. CHAVELLE: For the purpose of the record also, I object to all of this so that there can be no question about it, on the ground it is not proper or relevant, the evidence having been secured illegally, by an unlawful search.

"THE COURT: Overruled.

"MR. CHAVELLE: Exception.

"Mr. Hamer, a federal officer, opened all the sacks to see whether they were all alike, and we talked to the defendant about the contents of the sacks. We searched the car thoroughly for papers or anything that might be of information to us, and we found two sacks under the hood. We just went and took charge of the car, and searched it minutely. That at the time of the defendant's arrest, there was with the witness Mr. Hamer, a federal officer, and Mr. Howaldt. That the opium was brought to the Post-office Building by Mr. Hamer, and left in Mr. Hamer's possession."

Testimony of C. Howaldt:

"Q. Did you have any conversation with the defendant King at that time?

"MR. CHAVELLE: I object to that, your Honor, for the purpose of preserving the record, for the reason and upon the ground that any conversation that was had at that time would be evidence that was secured through an illegal search anl seizure, and would not be competent.

"THE COURT: Overruled.

"MR. CHAVELLE: Exception. May my objection go to all the testimony of the witness.

"THE COURT: Proceed.

"MR. CHAVELLE—so that I will not have to reiterate it.

"The witness stated that he had no personal conversation with King, but that he overheard a conversation in which the defendant said that he got the sacks over in West Seattle.

"Q. Did he state from whom?

"MR. CHAVELLE: I object to that, because of the fact that the evidence was secured by an illegal search warrant.

"THE COURT: It is all under the same objection. Proceed.

"The witness stated that the defendant said he took a couple of men over to West Seattle, and they hired him to haul the sacks back; that there were three sacks between the seats in the back of the car; that he was not present when the other two sacks were found; that the sacks were opened by Mr. Hamer, a Federal Agent." (Tr. pp. 44-46).

A. B. Hamer, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

"MR. CHAVELLE: Note my objection on the same ground, to the testimony of this witness.

"Q. (By the Court): Relate the circumstances of the arrest, and what you know about it; how you happened to be there.

"A. One of the officers in Tacoma called me up a couple of days previously—

"MR. CHAVELLE: I object to what the officer in Tacoma did in regard to calling him up.

"THE COURT: Overruled.

"MR. CHAVELLE—Without the presence of the defendant. Exception.

"A. —told me that King was over there with an automobile.

"Q. (By the Court): Not what King was doing, over there in Tacoma.

"A. I thought you wanted to know how we knew he was down there.

"Q. Not what anybody told you about King, in the absence of King.

"A. I don't know how to explain it. I knew the boys over there were watching him.

"MR. CHAVELLE: I object to that, and ask to have it stricken, and the jury instructed to disregard it.

"Q. Proceed. What you know yourself about the defendant.

"A. A Blue Funnel boat came over here that morning, and we watched for him that night.

"MR. CHAVELLE: I object to that as irrelevant and immaterial.

"THE COURT: The objection is overruled.

"Q. Were you present when any opium was found in the car?

"A. Yes, we found two bags under the hood.

"Q. (By the Court): In view of my ruling, I will ask you this: What else, if anything, did you know with relation to the defendant that led you to arrest him?

"MR. CHAVELLE: I object to that, your Honor, as incompetent, irrelevant and immaterial.

"THE COURT: Let that be noted.

"MR. CHAVELLE: Exception.

"A. I had known he was in this business for a long time.

"MR. CHAVELLE: I object to that. That is a conclusion of the witness.

"THE COURT: That may be stricken.

"MR. CHAVELLE: I ask that the jury be instructed to disregard it.

"Q. Mr. Hamer, did you have any reason to believe that the defendant in this case was going to receive a shipment of opium from any source, on the night in question?

"MR. CHAVELLE: I object to that.

"THE COURT: He may state whether the defendant was under suspicion, whether he had reason to believe a felony was being committed.

"MR. CHAVELLE: Exception.

"A. I did.

———

"MR. HOAR: At this time we offer the Government's Exhibit No. 2 in evidence. I think we neglected to before.

"MR. CHAVELLE: I object upon the ground and for the reason that the same was secured by an unlawful search and seizure.

"THE COURT: Admitted.

"MR. CHAVELLE: Exception.

"(Can of opium received in evidence, and marked Government's Exhibit No. 2)." (Tr. pp. 48-53).

Assignment No. 3. That the Court erred in its refusal to instruct the jury as requested by the defendant, as follows:

I.

The Court directs you to find a verdict for the defendant, upon the ground of the insufficiency of the evidence, the search and seizure having been illegal and unlawful, in that while the defendant was proceeding in a peaceful manner upon a highway in the city of Seattle, county of King, State of Washington, within the jurisdiction of this Honorable Court, he was halted by a federal agent, and his car searched by said federal agent, and the defendant placed under arrest by said federal agent, all without any search-warrant whatsoever, and the evidence obtained was so obtained by said unlawful search and seizure.

II.

The Court instructs you to find a verdict for

the defendant, upon the ground of the insufficiency of the evidence, the search and seizure having been illegal and unlawful, in that while the defendant was proceeding in a peaceful manner upon the highway in the city of Seattle, county of King, State of Washington, within the jurisdiction of this Honorable Court, he was halted by a federal agent, and his car searched by said federal agent, and the defendant placed under arrest by said federal agent, all without any search-warrant whatsoever, and the evidence obtained was so obtained by said unlawful search and seizure.

III.

You are directed that the evidence in this case has shown that the defendant is the operator of a for hire automobile, and if the defendant has satisfied the jury that he has no knowledge of, and used due diligence to prevent the presence of the opium in said automobile, then it is your duty to acquit him.

Assignment No. 4. The Court erred in overruling the motion of the defendant for a direct verdict of acquittal, made at the close of the entire case, and before it was submitted to the jury, which motion was based upon the ground that there was not evidence offered except that secured by an illegal search and seizure.

Assignment No. 5. The Court erred in denying the motion of said defendant for a new trial, which motion was made in due time after the jury

had returned a verdict of guilty as charged in Counts I and II of the indictment, upon the following grounds:

1. Error in law committed by the trial Court in refusing to grant the motion of the defendant to suppress the evidence.

2. That said verdict was against and contrary to law.

3. That said verdict was against and contrary to the evidence.

4. Insufficiency of the evidence to justify the verdict.

5. Errors of law occurring during the trial, and excepted to by the said defendant.

6. Refusal of the Court to grant motion of the defendant to dismiss counts I and II of said indictment on the ground of the insufficiency of the evidence to sustain either count.

7. Error of the trial Court in refusing to direct a verdict for said defendant of not guilty.

8. Refusal of the Court to instruct the jury as requested by the instructions of the defendant.

Assignment No. 6. The Court erred in denying the motion of the defendant, in arrest of judgment, which motion was made in due time after the jury had returned a verdict of guilty as charged on counts I and II of the indictment, upon the following grounds:

1. That the evidence introduced at the trial

was insufficient to sustain the verdict rendered herein.

2. That the motion to suppress the evidence by reason of the illegal and unlawful search and seizure, was erroneously denied.

3. Variance between the indictment and proof introduced at the time of trial.

ARGUMENT

The error assigned which is directly raised by each of the errors claimed herein is that the conviction was based upon evidence secured by an unlawful and illegal search and seizure. Upon the hearing upon the amended petition to suppress the evidence, the federal officer admitted that he proceeded, without a search warrant or any warrant in law, to halt and immediately place under arrest the plaintiff in error on the morning in question, and that a certain quantity of smoking opium was found by Hamer and one Majewski, a police officer, in his automobile. Majewski said that he had not met the plaintiff in error before the date of the arrest and that when the plaintiff in error's car was stopped he did not know what was in it; that at the time the plaintiff in error was proceeding in a peaceful and orderly manner along the highway; that he had been looking for prowlers and that the curtains of the plaintiff in error's car were up. The plaintiff in error stated that the curtains of the car had been up all the time, as it was bad weather.

There is no question in this case but what the plaintiff in error was proceeding along the highway in an orderly manner and that the officers had no reason or excuse to halt or stop him and initiate a search which disclosed the evidence upon which both counts of the indictment are based. The guaranties of the Federal and State constitutions against unlawful search and the compelling of an accused person to give evidence against himself are expressed in the fourth and fifth amendments to the Federal constitution; and in Sections 7 and 9, Article I, of our State constitution, as follows:

> "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."
>
> "No person shall be compelled in any criminal case to give evidence against himself, * *"

Thus showing that these guaranties of both the Federal and State constitutions are in substance the same and making the law on the subject, as expounded by the Supreme Court of the United States, presently to be noticed, conclusive upon an illegal and unlawful search and seizure which involves the question of the introduction against the plaintiff in error of evidence unlawfully obtained in violation of his constitutional rights, as was the evidence here in question.

Amos v. U. S., 255 U. S. 313.

Boyd v. U. S., 116 U. S. 616; 29 L. Ed. 746; 6 Sup. Ct. 524.

Weeks v. U. S., 232 U. S. 383; 59 L. Ed. 652; L. R. A. 1915 B 834; 34 Sup. Ct. 341; Ann. Cas. 1915 C 1177.

Silverthorne Lumber Co. v. U. S., 251 U. S. 385; 64 L. Ed. 319; 40 Sup. Ct. 182.

Gouled v. U. S., 255 U. S. 298; 41 Sup. Ct. 261.

Lambert v. U. S., 282 Fed. 413-414-417.

U. S. v. Kaplan, 286 Fed. 963-973.

Giles v. U. S., 284 Fed. 208.

U. S. v. Myers, 287 Fed. 260.

U. S. v. Case, 286 Fed. 627.

U. S. v. Innelli, 286 Fed. 731.

Ganci v. U. S., 287 Fed. 60.

U. S. v. Falloco, 277 Fed. 75.

Woods v. U. S., 279 Fed 706.

Honeycutt v. U. S., 277 Fed. 939.

Snyder v. U. S., 285 Fed. 1.

Pressly v. U. S., 289 Fed. 477

Murby v. U. S., 293 Fed. 849.

U. S. v. Slusser, 270 Fed. 819.

U. S. v. Musgrave, 293 Fed. 203.

Manifestly, the Constitutional guaranties that the rights of the people to be secured in their persons, houses, papers and effects against unreasonable searches and seizures, as expressed in the fourth and fifth amendments to the Federal Constitution, and that no warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons

or things to be seized, guarantees the right of a person to be undisturbed in his private affairs or his home invaded without authority of law, and protects the person in the possession of his automobile and all that is in it while upon public streets, against arrest and search without authority of a warrant of arrest or a search warrant, as fully as he would have been so protected had he and his possessions been actually inside of his own dwelling. And so fully has the protection of this guaranty been extended by the courts since time immemorial; since John Wilkes in England more than one hundred and fifty years ago fought his great battle, and our forefathers cast the tea into the seas in a protest over the infringement of what they knew to be their rights. And it is but to repeat the history of the long struggle for the security of personal rights in the English-speaking world which induced the adoption of these guaranties in the Federal Constitution of our Union and into most, if not all, of the State constitutions of the same, and it has been clearly annunciated by our great Court as still the law of the land.

It is admitted by the prosecution that they had no search warrant, and without the evidence that was secured by the unlawful search and seizure there was no case against the plaintiff in error. There is nothing to justify the search and seizure except that the officers, prowling about, had stopped several cars that evening, in the operation of a

prowler car, an occupation incident to the duties of the Police Department, and that the plaintiff in error was proceeding in an orderly and peaceful manner along the highway; that they had halted the plaintiff in error and immediately placed him under arrest and *immediately* proceeded to search his automobile, opening up some sacks which were securely wrapped.

The officer Majewski testified that he had not met the plaintiff in error before the day in question; that when the plaintiff in error's car was stopped he did not know what was in it. Participating in the arrest and in the search was a federal officer, who took possession of the contraband, thus compelling the plaintiff in error to produce evidence against himself.

Permitting a demand to be made upon the defendant in a criminal case, in the presence of a jury, to produce a paper or document containing incriminating evidence against him, is a violation of the immunity secured to him by the fifth amendment of the Constitution of the United States, providing that no person in any criminal case shall be compelled to be a witness against himself.

McKnight v. U. S., 115 Fed. 972.

If the prosecution has no right to make a demand upon a defendant in the presence of a jury to produce incriminating evidence against himself, how then can it be said that evidence procured in an un-

lawful manner through the violation of the accused's constitutional guaranty against unlawful search and seizure, may be used against him, as was done in this case? If the officers knew that a felony was being committed, they could have secured a search warrant, if they had facts sufficient upon which to have made a proper application affidavit, not a mere conjecture or suspicion, but facts which would authorize the issuing of a search warrant by the United States Government—mere suspicion would not be sufficient, nor would a conclusion of the applicant that a felony was being committed. There must be probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized. If an officer can, as under the circumstances in this case, where a man is driving his car in an orderly and peaceful manner along a public highway, stop him at the end of a sawed-off shot-gun, placing him under arrest and compelling him to submit to search, ripping open packages that are found in his car to ascertain their contents and then using them against him as evidence to convict him, then the liberty of each individual is in the hands of every petty officer.

In *State v. Gibbons,* 118 Wash. 171, 189, the State of Washington, construing the Eighteenth Amendment anl reviewing the Federal cases as applicable to the subject of searches and seizures, where possession of contraband was not actually disclosed until examination of the defendant's vehicle, found that the trial court erred in admitting in evi-

dence the contraband so unlawfully taken from its possessor. In the case in question the sheriff had a suspicion that the man had intoxicating liquor in his car and telephoned one of his deputies to secure a search warrant; then, placing the defendant under arrest, proceeded to take him to the court house, where the warrant was secured and a search made, disclosing the contraband. The sheriff claimed that at the time he opened the suit case in the car he had in his possession a search warrant and therefore his act must be considered lawful, but, as the Supreme Court of the State of Washington said.

> "the fallacy of such a view lies in the fact that the sheriff had, before any search warrant was issued, completely seized and taken into his possession the appellant and the automobile and all that was in it, including the whiskey, although he did not actually see the whiskey until after he arrived at the court house. This was plainly an illegal seizure of the whiskey in so far as want of a search warrant was concerned, and the possession of the sheriff could not be rendered legal by the coming into his hands of a search warrant which was issued after such an unlawful seizure."

A learned and somewhat extended view of the question may be found in *People v. Marxhausen,* 204 Mich. 509, 171 N. W. 557, where the law announced is in full harmony with the Federal Supreme Court and a most learned and extensive opinion of the law of search warrants has been set forth in *U. S. v. Kaplan,* 286 Fed. 963, supra.

Upon the petition to suppress the evidence in

this case and the affidavit supporting it, there was nothing the court could legally have done except suppress the evidence, but the Court attempted to justify the introduction of the evidence by suggesting to the witness, Hamer, a federal agent, over the objection of counsel, to which an exception was duly noted, that the plaintiff in error was perhaps under suspicion by the said officer or that he had reason to believe a felony was being committed, although the two other officers stated that they were out looking for prowlers, not the plaintiff in error, and did not know the plaintiff in error until after he was arrested and did not know what was in the car until it was stopped and searched. And it was upon the officer, after the words were put into his mouth, answering "I did" to this suggestion of the Court, that the offer of the Government that the evidence secured by said search and seizure be admitted, was so admitted, over the objection of counsel, to which an exception was noted, and the subsequent motion to dismiss Counts I and II of the indictment, for the reason and upon the ground that all of the material evidence was secured by an unlawful search and seizure of the plaintiff in error's automobile and contents without a search warrant, was denied, and exception allowed.

Even though the plaintiff in error explained that he was a for hire driver and the officers stated that they knew the contraband was not his, the Court refused to instruct the jury, as requested by counsel, as follows:

> "You are directed that the evidence in this case has shown that the defendant is the operator of a for hire automobile, and if the defendant has satisfied the jury that he had no knowledge of and used diligence to prevent the presense of the opium in said automobile, then it is your duty to acquit him."

All the officers testified that the plaintiff in error was the operator of a for hire automobile, as did the plaintiff in error, and if the plaintiff in error satisfied the jury that he had used due diligence to pre vent the presence of opium in his automobile and had no knowledge of its presence there, then the Court erred in refusing to so instruct them. That was the question before the jury—that is, the intent of the plaintiff in error to commit a crime, and, upon the request so to do, the Court would have fairly submitted the issue to them. At the end of the Government's case the plaintiff in error moved for a direct verdict, which was denied and exception allowed, for the reason and upon the ground that there was no evidence except that secured by an illegal search and seizure, the Court then indicating that there was testimony that the search was made by police officers of the City. Mr. Hamer, the Federal Agent, in his testimony, said he participated in the search. Upon cross-examination of the witness by counsel for plaintiff in error he testified:

> "Q. You participated in this arrest?
>
> "A. Yes, sir, I did.
>
> "Q. You participated in the search?

"A. Yes, sir."

Then, referring to an affidavit filed in opposition to the motion to suppress:

"Q. Mr. Hamer, an affidavit was filed in this case that the defendant was halted by you. Did you not swear to that?

"A. He was halted by us—Majewski.

"Q. Your affidavit under date of the 14th of June, to refresh your recollection, says: 'The defendant was halted by affiant'—that is yourself—'and said Majewski, and immediately placed under arrest,' that is right?

"A. And said Majewski.

"Q. And said Majewski?

"A. And said Majewski, yes."

It was Hamer, the Federal agent, who opened the sacks and found out what was in them. It was Hamer who immeliately took possesion of them and held them until the day of the trial. There does not appear, therefore, to be any ground to suppose that the Court can make an illegal and unlawful search lawful merely because there happened to be a policeman along. *Segman v. U. S.,* 296 Fed. 474.

All of the testimony in the case was irrelevant and immaterial as to the facts learned and information obtained while conducting an unlawful search. *U. S. v. Singleton,* 290 U. S. 130, where the court said that a federal agent cannot be aided by a state search warrant not in accord with the Federal law. So the fact that a Federal agent takes two policemen along would not appear to justify an other-

wise illegal and unlawful search. *U. S. v. Case,* 286 Fed. 627, where the Court held that evidence obtained by a State officer by an unlawful search was incompetent in a Feleral court if a Federal officer co-operated with the State officer in the unlawful search. *U. S. v. Falloco,* 277 Fed. 75, supra.

It was plainly the duty of the trial court to have granted the amended motion of the plaintiff in error to suppress the evidence, and, having failed in that, to have granted the numerous motions interposed by the plaintiff in error during the trial of the case and the motion in arrest of judgment and for a new trial. His failure so to do was erroneous for the reasons hereinbefore given.

We respectfully submit that the judgment in this case should be reversed.

Respectfully submitted,

EDWARD H. CHAVELLE,

Attorney for Plaintiff-in-Error.
Richard E. King.

No. 4210

/ 3

In the United States Circuit Court of Appeals

For the Ninth Circuit

RICHARD E. KING, Plaintiff in Error

vs.

UNITED STATES OF AMERICA, Defendant in Error

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division

Honorable Jeremiah Neterer, Judge

Brief of the United States of America, Defendant in Error

THOS. P. REVELLE
United States District Attorney

J. W. HOAR
Special Assistant United States Attorney

310 Federal Building, Seattle, Washington

No. 4210

In the

United States Circuit Court of Appeals

For the Ninth Circuit

DELLA SAYERS, Plaintiff in Error

vs.

No. 4218

UNITED STATES OF AMERICA,

Defendant in Error

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division

Honorable Jeremiah Neterer, Judge

Brief of the United States of America, Defendant in Error

STATEMENT OF THE CASE

An information was filed in this case charging plaintiff in error, Richard E. King, with the violation of the narcotic drugs import and export act,

on two counts; with the importation of opium on count I and with the buying, receiving and concealing of the same opium on count II; the defendant was found guilty on both counts.

The evidence on behalf of the government showed that police officers, John Majewski and C. Hawaldt, and one A. B. Hamer, a government agent, were in a city automobile in the City of Seattle about four o'clock in the morning on the 16th day of April, 1923; that the police officers were engaged in their nightly occupation of looking for prowlers; that they saw the car of the defendant approaching and stopped it and police officer Majewski went over to the defendant's car and after a brief conversation discovered some sacks in the tonneau of the defendant's car; that the defendant failed to satisfactorily account for the presence of the sacks or their contents in his car other than to say that he had been employed to haul the same to a certain destination where they would be redelivered to the parties who had engaged his services; that he further failed to satisfy the officer as to the course of his travel, having stated that he had come from West Seattle, when the officer noticed that he had come from the direction of the Fisher Flour Mills, which was reached by a branch road. The defend-

ant was then placed under arrest and taken to the police station and thereupon a careful search of the car by officer Majewski and agent Hamer revealed three sacks in the tonneau and two sacks under the hood of the automobile containing, in the aggregate, two hundred and eighty-eight five tael tins of opium prepared for smoking with an estimated value of twenty-one thousand six hundred ($21,600) dollars. There was found a spotlight, in the car, containing a red and a green light bulb in addition to the ordinary white bulb.

The testimony on behalf of the government further showed that government agent Hamer had received information which placed the defendant under suspicion and gave the agent reason to believe that a felony was being committed by the defendant.

On behalf of the defendant, evidence was introduced to show that he was engaged in the business of taxicab driver as an employee of his step-father; that at about midnight he received a message to call for passengers at the Seattle Hotel; that when he arrived at the hotel he found a Chinaman and a white man waiting for him; that he carried them over to West Seattle, where he arrived about one thirty a. m.; that he waited approximately two

hours for them to return and while doing so, fell asleep in his car; that he was awakened by them and told to take the packages, which they had placed in the car, to Pioneer Square and wait for them there; that he did not know any packages had been placed under the hood of his car; that he did not know the names of his passengers and did not consider the employment unusual or of such a nature as to arouse his suspisions.

ARGUMENT

A petition to suppress, and an amended petition to suppress, certain evidence were duly presented to the court and denied prior to the trial of the case. (Tr. 42.)

At the conclusion of the testimony a motion for a directed verdict was denied, the court saying: "There is testimony here that the search was made by the police officers of the city, and it is likewise testified that there was reason to believe that a felony was being committed. The motion is denied." (Tr. 60.)

The sole question before this court is, was the admission of certain evidence secured without a search warrant, error?

The defendant admits the possession of the opium but denies knowledge of its nature previous to his arrest.

That if no government agent had been present in the police car, clearly there could be no question as to the admissability of the evidence, has been frequently decided.

Riggs vs. U. S., 299 Fed. 273 (4 C. C. A.).

U. S. vs. O'Dowd, 273 Fed. 600.

U. S. vs. Burnside, 273 Fed. 603.

Youngblood vs. U. S., 266 Fed. 579 (8 C. C. A.).

Did the fact that a government agent was present in the police car when the defendant was stopped and arrested by the police officer, not knowing who defendant was, change the situation?

There is no evidence that the police were acting under the directions of the government agent, and on the contrary the police officer stopped the defendant's car the same as he would any other prowler.

It has been held that "the mere presence of the federal officer at the search and his participation at the instance of the state officer did not render evidence obtained by the search incompetent, even

if the warrant was invalid." (*Malacrouis vs. U. S.*, 299 Fed. 253, 255 (4 C. C. A.)

Thomas vs. U. S., 290 Fed. 133.

Elrod vs. Moss, 278 Fed. 123.

On the other hand, if the testimony were construed to show that the government agent, Hamer, was not only present but actually participated in the arrest and search, was it error to admit evidence so obtained?

The contention of the government is, and it was so decided by the court (Tr. 60), that there was testimony showing reason to believe that a felony was being committed at the time of the arrest. Counsel for the plaintiff in error argues that upon the discovery that a felony was being committed, the officer should have secured a search warrant.

Does it sound reasonable that the defendant should have been permitted to go on his way while a search warrant was being sought? What would be the chance of a conviction if such steps were ordinarally taken?

In cases of felony, arrest may be made without a warrant when the arresting officer has information or knowledge of fact reasonably calculated to induce a belief that a felony has been committed

and that the person thus arrested without a warrant is guilty of having committted it. This was the rule at common law which has been generally adopted.

It is the contention of the government that any private individual having reasonable belief that a felony is about to be committed may arrest without warrant in order to prevent the crime, or may arrest another when a felony is being or has been committed.

The defendant took the witness stand and admitted practically every material fact testified to by the government witnesses and sought to explain away his possession of the contraband. The jury heard the evidence and by their verdict showed that they did not believe his story. He now seeks to have their verdict reversed on the ground that certain incompetent evidence was admitted against him.

In the case of *Libera vs. U. S.*, 299 Fed. 300 (9 C. C. A.) at page 301, the court said: "Before the trial the plaintiff in error petitioned the court for the return of property seized under a search warrant, on the ground that the search was unauthorized and illegal and the search warrant was of doubtful validity because of a mistake in the name

of the street and in the name of the owner or occupant of the premises; but the plaintiff in error took the witness stand in his own behalf and admitted the possession of the still and the possession of the intoxicating liquor as charged. In short, he admitted every material fact testified to by the raiding officers and is now in no position to claim that incompetent testimony was admitted to establish facts testified to by himself."

It is submitted that the defendant's rights in this case were fully protected at every stage of the trial and that the evidence introduced against him was competent and clearly admissible; that the officers had the right to arrest defendant who was caught in the act of committing a felony; and that the petition of the plaintiff in error for a new trial should be denied.

Respectfully submitted,

THOS. P. REVELLE,
United States Attorney.
JOHN W. HOAR,
Special Assistant United States Attorney.